No. 17-515	
Title:	**CNH Industrial N.V., et al., Petitioners** **v.** **Jack Reese, et al.**
Docketed:	October 5, 2017
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(15-2382)
Decision Date:	April 20, 2017
Rehearing Denied:	August 28, 2017

DATE	PROCEEDINGS AND ORDERS
Oct 03 2017	Petition for a writ of certiorari filed. (Response due November 6, 2017)
Oct 23 2017	Blanket Consent filed by Petitioners, CNH Industrial N.V., et al.
Oct 23 2017	Order extending time to file response to petition to and including November 20, 2017.
Nov 06 2017	Motion for leave to file amicus brief filed by Whirlpool Corporation.
Nov 06 2017	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al.
Nov 06 2017	Motion for leave to file amicus brief filed by Erisa Industry Committee.
Nov 20 2017	Brief of respondents Jack Reese, et al. in opposition filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Dec 01 2017	Reply of petitioners CNH Industrial N.V., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 06 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 04 2018	Rescheduled.

Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
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Feb 20 2018	Motion for leave to file amicus brief filed by Erisa Industry Committee GRANTED.
Feb 20 2018	Motion for leave to file amicus brief filed by Whirlpool Corporation GRANTED.
Feb 20 2018	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. GRANTED.
Feb 20 2018	Petition GRANTED. Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)
Mar 26 2018	JUDGMENT ISSUED.

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RECORD AND BRIEFS

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No. ____

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC

PETITIONERS,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit, over the compelling dissent of Judge Jeffrey S. Sutton, misinterpret this Court's unanimous decision in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), and thus create conflicts both with the decisions of other circuits and within the Sixth Circuit itself, by employing rules of contract interpretation explicitly repudiated in *Tackett* to deem a general duration clause in the Collective Bargaining Agreement ambiguous, and then using extrinsic evidence to hold the healthcare benefits of the retiree class vested for life?

PARTIES TO THE PROCEEDINGS

Petitioners are CNH Industrial N.V. and CNH Industrial America LLC ("CNH"). Respondents are a class of former CNH employees who retired from CNH after 1 July 1994 and before 1 April 2005, and their spouses ("Retirees"). The class is represented by individual retirees Jack Reese, James Cichanofsky, Roger Miller, and George Nowlin.

CORPORATE DISCLOSURE STATEMENT

Petitioner CNH Industrial N.V. is a publicly traded entity that is the ultimate parent of Petitioner CNH Industrial America LLC. Respondents are individuals. No other publicly traded entity has a financial interest in the outcome of this appeal.

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PETITION FOR WRIT OF CERTIORARI

CNH Industrial N.V. and CNH Industrial America LLC respectfully submit this petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, App. 1, is published at 854 F.3d 877 (6th Cir. 2017) (*Reese III*), *reh'g en banc denied*, App. 112. The operative final judgment of the United States District Court for the Eastern District of Michigan, App. 85, issued on reconsideration of its earlier grant of summary judgment, App. 40, is published at 143 F. Supp. 3d 609 (E.D. Mich. 2015).

JURISDICTION

Under 28 U.S.C. § 1291, the Sixth Circuit had jurisdiction to review the final judgment of the United States District Court for the Eastern District of Michigan. The Sixth Circuit entered its judgment on 20 April 2017. App. 1. CNH and the Retirees filed timely cross-petitions for rehearing en banc, both of which the Sixth Circuit denied on 28 August 2017. App. 112. This petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Factual Background

Petitioners and their corporate predecessors (collectively "CNH") manufacture construction and agricultural equipment. Respondents are a class of CNH retirees ("the Retirees"), all of whom retired after 1 July 1994 and before 1 April 2005, and their spouses. The Retirees were represented in their labor negotiations with CNH by the United Automobile, Aerospace, and Agricultural Workers of America (the UAW).

Beginning in 1971, the UAW and CNH negotiated and agreed to a series of collective bargaining agreements (CBAs) covering CNH employees. Each CBA contained a general durational clause providing that the CBA would "continue in full force and effect" until a date certain. *E.g.*, App. 115. Each CBA also provided that the written agreement "disposes of any and all bargaining issues, whether or not presented during negotiations." *E.g.*, App. 115.

In 1994, the prior owner of the company sold its assets into the entity now known as CNH, and the successor entity assumed the prospective obligations of the existing CBA. *See Reese v. CNH Am. LLC*, 574 F.3d 315, 318 (6th Cir. 2009) ("*Reese I*"). That existing CBA was initially entered in 1990, and was extended in November 1993 into 1995. In the first CBA entered by the new entity in 1995, the Group Benefit Plan ("GBP") provided that all employees who retired after 1 July 1994 (the date of the restructuring)—even those who had retired under

the 1993 extension—"shall be eligible for Group benefits as described" in the GBP. Doc. 129-31 at 6295 (1995 GBP). The 1995 GBP "r[a]n concurrently with" the 1995 CBA, which continued until March 1998, and also contained an integration clause.[1]

In May 1998, CNH and the UAW entered the CBA and GBP at issue here, with a specified termination date of 2 May 2004. App. 115. The 1998 GBP "r[a]n concurrently with" the 1998 CBA, and also contained an integration clause. App. 114. Like the 1995 plan, the 1998 GBP provided health benefits as follows:

> Employees who *retire* under the [CNH] Pension Plan for Hourly Paid Employees *after 7/1/94*, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group Benefits as described in the following paragraphs.

App. 116 (emphasis added); *see also* App. 4 (emphasis added). All members of the Retiree class—whether they retired under the 1993 CBA extension, the 1995 CBA, or the 1998 CBA—receive their benefits under the 1998 CBA and GBP. The 1998 CBA and GBP expired by their terms on 2 May 2004. Subsequent

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[1] The 1993 and 1995 CBAs also incorporated Letters of Understanding (the "cap letters") stating, in relevant part, that CNH's annual per capita cost of providing the benefits would be capped at specified amounts, but also providing that "no covered person" would be required to pay "a portion of the excess amount" until a specified future date. Doc. 125-6 at 4438 (Extension Agmt.); Doc. 125-8 at 4560 (1995 Tent. Agmt.). The cap letters were eliminated in the 1998 CBA.

agreements between CNH and the UAW do not provide benefits to this Retiree class, but the benefits under the 1999 plan have continued due to this litigation.

The 1998 CBA and GBP changed the Retirees' benefits in several important ways. Whereas earlier CNH insurance programs provided indemnity coverage, the 1998 plan imposed managed care on all Retirees in the class, even those who had already retired under earlier CBAs. App. 116. The 1998 plan also incorporated a "Letter of Understanding" in which "the Company and the Union agreed" that "retirees who are enrolled" in a medical plan "will not have to pay any additional employee contributions above those which may be required for enrollment" "*over the term of the 1998 labor agreement.*" App. 118 (emphasis added). Finally, the 1998 CBA contained a Letter of Understanding addressing "National and State Health Insurance Initiatives." That Letter allowed CNH to modify the benefits provided under the GBP "to integrate or eliminate the duplication" of benefits provided in any subsequently enacted Federal or State health security act." App. 117–18.[2]

B. Procedural History

The decision below is the Sixth Circuit's third decision in this case. In early 2004, CNH sought a declaratory judgment from the United States District Court for the Eastern District of Wisconsin, adjacent

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[2] Pursuant to this provision, effective 1 January 2015, CNH required Medicare-eligible Retirees to participate in the Medicare Part D prescription drug program, at no increased cost to the Retirees but with considerable savings to CNH. Doc. 423-4 (Burchfield Ltr.)

to CNH's headquarters in Racine, that the 1998 CBA permitted it to modify or eliminate the Retirees' health benefits. The Retirees counter-sued in the Eastern District of Michigan, even though CNH had no employees or facilities within the Sixth Circuit, so the Retirees could take advantage of the "*Yard-Man* presumption" that retiree healthcare benefits were vested. *See UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). The Retirees sought a declaratory judgment that the benefits were vested, as well as an injunction preventing CNH from changing the benefits. After a forum fight, the case proceeded in the Eastern District of Michigan.

In 2007, the district court granted summary judgment in favor of the Retirees, ruling based on *Yard-Man* that the 1998 CBA promised vested retiree healthcare benefits. As this Court recognized in *Tackett*, the *Yard-Man* line of decisions created an effective "presumption" in favor of vesting. *Tackett*, 135 S. Ct. at 935 (citing *Cole v. Arvin-Meritor, Inc.*, 549 F.3d 1064, 1074 (6th Cir. 2008)).

The Sixth Circuit affirmed the vesting decision, also based on the *Yard-Man* presumption. *Reese I*, 574 F.3d at 322–23. But it also held that the CBA did not preclude CNH from making reasonable unilateral changes to the benefits if certain criteria were met, *id.* at 327, and remanded the case for consideration of proposed changes.

On the first remand, the district court ruled that CNH could not unilaterally modify the benefits and again granted summary judgment for the Retirees. *Reese v. CNH Global N.V.*, No. 04-70592, 2011 WL 824585 (E.D. Mich. March 3, 2011). On the second

appeal, the Sixth Circuit held that the district court had "misread the panel opinion" in *Reese I*, and accordingly reversed and remanded with further instructions for determining whether CNH's proposed benefit changes were reasonable. *Reese v. CNH Am. LLC*, 694 F.3d 681, 685–86 (6th Cir. 2012) ("*Reese II*").

During the second remand, this Court decided *Tackett*, which abrogated the Sixth Circuit's *Yard-Man* rules. Based on *Tackett*, CNH moved for summary judgment on vesting, arguing that under *Tackett* and ordinary principles of contract law the CBA and GBP do not promise vested benefits. Initially, the district court granted summary judgment to CNH, App. 85, but after the Retirees moved for reconsideration, the district court reversed itself and entered summary judgment for the Retirees, App. 40.

While CNH's third appeal was pending, the Sixth Circuit decided *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 375 (2016).[3] In that decision, the Sixth Circuit followed the ordinary contract principles set forth in *Tackett* and concluded that the contract at issue did not promise vested benefits for life. *Id.* at 268–69. Key to the holding was that "nothing in ... the CBAs say[] that Moen committed to provide unalterable

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[3] On remand from this Court, the Sixth Circuit further remanded *Tackett* to the district court. *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204 (6th Cir. 2016) ("*Tackett III*"). In its remand order, the *Tackett* panel made a number of observations in dicta that have sown confusion in subsequent decisions. *See* pp. 20–21 & n.7 below.

healthcare benefits to retirees and their spouses for life" and that "everything [the CBAs] say about the topic [of retiree benefits] was contained in a [time-limited] agreement." *Id.* at 269. "Absent a longer time limit in the context of a specific provision," the court held, "the general durational clause supplies a final phrase to every term in the CBA: 'until this agreement ends.'" *Id.* (citing *Tackett*, 135 S. Ct. at 936). The Sixth Circuit denied rehearing in *Gallo*, and this Court denied the retirees' petition for a writ of certiorari. 137 S. Ct. 375 (2016).

On 20 April 2017, the panel in this case and two other panels of the Sixth Circuit issued decisions addressing the vesting of retiree benefits. *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017) ("*Cole II*"); *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017); *Reese III*, App. 1.[4] The *Cole II* panel followed *Tackett* and *Gallo*, and unanimously concluded that the durational clauses in those CBAs precluded vesting. *See* 855 F.3d at 700 ("*Gallo* is legally indistinguishable from the present case."). But the panels in this case and in *Kelsey-Hayes*, both over vigorous dissents, refused to follow the general durational clauses, determined that the CBAs were ambiguous, and, after reviewing parol evidence, concluded that the benefits were vested.

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[4] Judge Gibbons, who authored the *Reese III* decision, concurred in the denial of rehearing in *Kelsey-Hayes*. She pointed out that the three "opinions were filed, by cooperation of all three panels, on the same date." *UAW v. Kelsey-Hayes Co.*, No. 15-2285 (6th Cir., Sept. 22, 2017) (Gibbons, J., concurring in denial of rehearing).

In the opinion below, the Sixth Circuit concluded that the CBA was ambiguous on the vesting issue. It discerned the ambiguity because certain other benefits had specific durational clauses, whereas the Retiree health benefits continued beyond each employees' retirement but the agreement was "silent on whether the [retiree health] benefits continue past the termination date of the agreement." App. 11. It also discerned ambiguity from the CBA's "tying of benefits to [the] achievement of pensioner status." App. 12. Although it conceded that *Tackett* instructs the court "not [to] infer vesting from silence" or "from the tying of benefits to achievement of pensioner status," it surmised that *Tackett* does *not* preclude using silence or tying of health benefit eligibility to pension eligibility to *find ambiguity*. *Id.*

By holding the written instruments ambiguous, the court said, it was "allow[ed] to explore the extrinsic evidence to discover what the parties actually intended." *Id.* That extrinsic evidence convinced the court that CNH had agreed to provide healthcare for the lifetimes of the Retirees and their spouses. App. 13–14.

Judge Sutton dissented, pointing out that the majority opinion "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." App. 28 (Sutton, J., dissenting). In addition to noting that the majority had ignored the CBA's integration clause, he pointed out that the ordinary contract principles set forth by *Tackett* "should make quick work of this case." App. 24. Because the contract "*never* promises lifetime healthcare benefits," and is at best "silent as to the

length of the commitment" to provide those benefits, "'a court may not infer that the parties intended those benefits to vest for life.'" *Id.* (quoting *Tackett*, 135 S. Ct. at 936–37). He rejected the majority opinion's determination of ambiguity, pointing out that the contract could be ambiguous only if it were susceptible to more than one fair reading, but any reading based on inferences rejected in *Tackett* was not a fair reading. "A forbidden inference cannot generate a plausible reading." App. 32. He concluded by showing that this decision is inconsistent with decisions on vesting of retiree health benefits by the Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits. App. 35–36.

Although requested to resolve the conflict between *Gallo* and *Cole*, on the one hand, and *Tackett III*, *Reese III*, and *Kelsey-Hayes*, on the other hand, especially the divergent treatment of durational clauses, the Sixth Circuit denied petitions for rehearing in all three cases decided on 20 April 2017, as it had before in *Gallo*. The denial of rehearing in *Kelsey-Hayes* drew concurring opinions by Judge Gibbons and Judge Sutton, as well as a dissent by Judge Griffin, who was joined by Judge Gilman. Judge Gibbons' concurrence contended that the three decisions, and *Gallo*, are legally consistent although factually distinguishable, but shared Judge Sutton's concern that en banc review "would not yield any productive results." *Kelsey-Hayes*, No. 15-2285, slip op. at 2–3. Judge Sutton concurred even though "[b]y nearly every measure, this case deserves en banc review.... An intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en

banc review." *Id.* at 4 (Sutton, J., concurring in denial of rehearing en banc). He reluctantly concurred in denial of rehearing, however, because in this instance "there is good reason to fear that a majority of the en banc court would fail to agree on a majority view." *Id.* Judge Griffin, joined by Judge Gilman, dissented on the ground that "[o]ur post-*Tackett* case law is a mess," with the decisions "in irreconcilable conflict regarding how courts are to view durational clauses." *Id.* at 5, 6 (Griffin, J., dissenting from denial of rehearing en banc). Further, Judge Griffin noted, "the issue of retiree healthcare guarantees presents a question of exceptional importance," warranting en banc review. *Id.* at 8. With denial of rehearing in *Kelsey-Hayes*, the Sixth Circuit has now declined *four* times to reconcile its decisions with *Tackett*, with decisions of other circuits, and with each other.

REASONS FOR GRANTING THE PETITION

Less than three years ago, in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), this Court unanimously resolved a long-standing conflict between the Sixth Circuit and all other circuits. The Court rejected the Sixth Circuit's presumption that collectively-bargained retiree healthcare benefits are vested and unalterable for life. The Court ruled that "ordinary principles of contract law" must govern vesting determinations, and set forth several such principles to guide the lower courts. Both the Third and Fourth Circuits have properly interpreted and applied *Tackett*, ruling that a general durational clause must be given effect unless the collective bargaining agreement says otherwise.

In the decision at issue here, however, the Sixth Circuit misinterpreted *Tackett* and, over the vigorous dissent of Judge Sutton, relied on rules of contract interpretation repudiated in *Tackett*. With this ruling, the Sixth Circuit once again brought itself into conflict with decisions of other circuits issued both *before Tackett* and *after Tackett*. Just as striking, this decision conflicts with other decisions of the Sixth Circuit that have properly interpreted and applied *Tackett*. Notwithstanding *four* rehearing petitions asking the en banc court to resolve the conflicts, the Sixth Circuit has declined to do so. Indeed, two Sixth Circuit judges concurring in the most recent denial of rehearing opined that en banc rehearing would be futile in resolving the conflict.

Thus, this decision has created both an *inter*-circuit and an *intra*-circuit conflict about what *Tackett* means. The predictable consequence is that district courts within the Sixth Circuit are issuing inconsistent decisions, retirees once again have an incentive to forum shop their vesting disputes in the Sixth Circuit, and employers continue to face great uncertainty about their retiree health benefit liabilities, which for an individual employer can total hundreds of millions or even billions of dollars. Because the Sixth Circuit has declined to use its en banc process to reconcile its own decisions with *Tackett*, decisions of other circuits, or even those of its own court, Petitioners CNH Industrial America LLC and its parent CNH Industrial N.V. urge this Court to grant review and resolve these conflicts.

I. THE SIXTH CIRCUIT MISINTERPRETED *TACKETT*.

A. *Tackett* Repudiated All *Yard-Man* Presumptions, Inferences, and Rules of Construction.

Tackett was unequivocal in its unanimous rejection of the presumptions, inferences, and rules of construction created by *Yard-Man* and its progeny. Of particular relevance here, the Court rejected the notion that "'a general durational clause says nothing about the vesting of retiree benefits,'" 135 S. Ct. at 935 (quoting *Noe v. PolyOne Corp.*, 520 F.3d 458, 555 (6th Cir. 2008)). The Sixth Circuit's "refus[al] to apply general durational clauses to provisions governing retiree benefits," and its requirement that a CBA must include "a specific durational clause for retiree health care benefits to prevent vesting," had the effect of "distort[ing] the text of the agreement and conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Tackett*, 135 S. Ct. at 936. This Court further rejected—twice—the notion that tying "'eligibility for retirement-health benefits to eligibility for a pension'" suggests that health benefits are vested. *Id.* (quoting *Noe*, 520 F.3d at 558); *see also* 135 S. Ct. at 937 (rejecting "tying of eligibility for health care benefits to receipt of pension" as "suggest[ing] an intent to vest health care benefits"). The Court rejected these and other rules as contrary to "ordinary principles of contract law." 135 S. Ct. at 930, 937.

But this Court went further. It set forth the key principles of contract law that it expects to guide

vesting decisions. Congress made a clear decision to exempt welfare plans providing health benefits from ERISA's vesting requirements. For this reason, the Court emphasized, the "rule that contractual 'provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.'" 135 S. Ct. at 933 (citation omitted). Indeed, the written language of the plan is "the linchpin" of the entire welfare benefits system, encouraging employers to provide those plans in the first place. *Id.* It is a "principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 936. The Court also pointed to "the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (citation omitted).

In addition to the importance of enforcing agreements as written, the Court further stressed "the traditional principle that courts *should not* construe ambiguous writings to create lifetime promises," and warned that "when a contract is silent as to the duration of retiree benefits, a court *may not* infer that the parties intended those benefits to vest for life." *Id.* at 936, 937 (emphasis added). The Court cited with approval the Sixth Circuit's decision addressing non-collectively-bargained retiree health benefits, which held that any intent to vest "'must be found in the plan documents and must be stated in clear and express language.'" *Id.* at 937 (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)). Benefits can vest if the CBA "'provide[s] in explicit terms that certain benefits continue after the agreement's expiration.'" 135

S. Ct. at 937 (quoting *Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 207 (1991)).[5]

B. The Sixth Circuit's Decision Resurrects *Yard-Man* Rules Rejected in *Tackett*.

The lower court's disregard of *Tackett* is plain enough: it revived two rules of construction from the *Yard-Man* era, both of which this Court explicitly rejected in *Tackett*, for the purpose of creating a contractual ambiguity.

The court first misinterpreted *Tackett* by refusing to heed the durational clause. The court observed that the CBA allowed health coverage to continue *beyond retirement*, but was *silent* on

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[5] The Court cited *Litton's* holding that a contract term requiring layoffs in reverse order of seniority did not continue beyond the expiration of the CBA. 501 U.S. at 210 ("We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration."). In her concurrence, Justice Ginsburg quoted other language from *Litton* suggesting that a continuing duty might arise from "implied terms of the expired agreement." *Tackett*, 135 S. Ct. at 938 (quoting *Litton*, 501 U.S. at 203 (Ginsburg, J., concurring). In *Litton*, the Court relied on "[t]he Agreement's unlimited arbitration clause," 501 U.S. at 205, to require post-expiration arbitration of disputes arising under the CBA. *See also id.* at 204 (reiterating this Court's "presumption in favor of postexpiration arbitration of matters" so long as "th[e] arbitration was of matters and disputes arising out of the relation governed by contract"). *Litton* thus recognizes the important distinction between continuation of a *dispute resolution mechanism* for disputes arising under the CBA even after expiration of a CBA which can be "*implied,*" and continuation of a "*benefit*" that was based on, and expired with, the CBA, which requires "*explicit*" language.

whether the benefits continued past the CBA's termination date. Although purporting to acknowledge that "the Supreme Court has commanded that we not infer vesting from silence," App. 12, the lower court said in this case, the "silence, rather than resolving ambiguity, furthers it," App. 30. Based on that perceived ambiguity, the lower Court seized on extrinsic evidence as supporting a promise of lifetime health benefits, notwithstanding this Court's instructions that adherence to the written agreement is "'especially appropriate'" in this context, *Tackett*, 135 S. Ct. at 933 (citation omitted), and that "courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936 (emphasis added).

This reasoning flouts *Tackett* in three ways. First, *Tackett* rejected the notion that "a specific durational clause for retiree health care benefits [was necessary] to prevent vesting." *Id.* at 936. Such a rule "distort[s] the text of the agreement." *Id.* Contrary to the lower court's ruling, the absence of a specific durational clause for the health benefits leaves them subject to the general durational clause. Second, the lower court used "silence" about the duration of the health benefits to find an ambiguity, and then used extrinsic evidence to find vesting. *Tackett* made clear, however, that "a court may *not infer* [from silence] that the parties intended those benefits to vest for life," *id.* at 937 (emphasis added), and "courts should not construe ambiguous writings to create lifetime promises," *id.* at 936. Third, as Judge Sutton pointed out in his dissent, the CBA *does* contain a specific limitation on the retiree health benefits: "The agreement says that the Group

Benefit Plan '*will run concurrently* with this Agreement, and is hereby made part of this Agreement.'" App. 26 (Sutton, J., dissenting).

The lower court's second ground for finding ambiguity also misconstrues *Tackett*. Although recognizing that *Tackett* "directed us not to infer vesting from the tying of benefits to achievement of pensioner status," the lower court nevertheless reasoned that such tying may render an otherwise clear agreement ambiguous. The lower court understood what it was doing: "Inferring vesting from tying alone violates *Tackett* and ordinary principles of contract interpretation. *Finding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended.*" App. 12 (emphasis added).

Again, this approach undermines the ruling in *Tackett*. *Tackett* made clear—twice—that tying eligibility for health care to eligibility for a pension was *not* evidence of vesting. 135 S. Ct. at 935, 937. If tying cannot support an inference of vesting, then it cannot create an ambiguity in a CBA that is otherwise unambiguous on the issue of vesting. As Judge Sutton put it in dissent, "[a] forbidden inference cannot generate a plausible reading." *See* App. 32 (Sutton, J., dissenting). Nor can this tying analysis overcome CNH's well-supported motion for summary judgment against vesting, because tying is not probative evidence of vesting. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249–50 (1986) (party opposing summary judgment must come forward with probative and admissible evidence sufficient to prove the disputed element of its case).

In addition to misinterpreting *Tackett*, the lower court also failed to address another undisputed indication of non-vesting. As shown (pp. 3–4 above), each successive CBA entered by CNH and the UAW since the 1994 reorganization extended retiree health benefits to all persons who had retired since "7/1/94." Thus, all the class members—whether they retired under the 1993 extension agreement, the 1995 CBA, or the 1998 CBA—are receiving their benefits under the 1998 CBA, which expired in 2004. The UAW and CNH "re-upped" the benefits in both the 1995 and 1998 bargaining cycles. If the benefits were vested for life under the CBA in effect at the time of retirement, it would have been unnecessary for the parties to include healthcare benefits in successive bargaining agreements for previously retired persons. App. 33 (Sutton, J. dissenting) (renegotiation of benefits in each CBA "indicates that they would have to be reset again when this agreement expired."). In the 2004 bargaining cycle however, the UAW deviated from the prior practice by refusing to negotiate for the existing Retirees, and they are not included in subsequent agreements. Thus, their benefits expired with the 1998 agreement in 2004.

In his dissent, Judge Sutton emphasized that the CBA "*never* promises lifetime healthcare benefits." App. 25 (Sutton, J. dissenting). He tracked the "traditional principles" set forth by this Court in *Tackett*, noting that the benefits expired with the CBA, that silence could not create vesting, and that an ambiguous contract could not support a lifetime promise. *Id.*

Review of the *Reese* decision is imperative to correct a plain misinterpretation of *Tackett*.

II. REVIEW IS NECESSARY TO RESOLVE BOTH AN INTER-CIRCUIT AND AN INTRA-CIRCUIT SPLIT OF AUTHORITY.

A. The Lower Court Decision Creates Conflicts Among the Circuits.

The lower court's decision not only returns the law of vesting to its unsettled state before *Tackett*, it also adds a new wrinkle: a conflict among the circuits about what *Tackett* itself means. Both inter-circuit conflicts justify grant of this petition. *See* S. Ct. R. 10(a).

Judge Sutton's dissent in the decision below compellingly demonstrates the inter-circuit conflict resurrected by the panel's decision. He pointed out that the decision "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." App. 28. To demonstrate the conflict, he quoted from pre-*Tackett* decisions of the Second, Third, Fifth, Seventh, and Eighth Circuits.[6] "I fear that we, again, are out of step." App. 36.

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[6] App. 35–36. Judge Sutton quoted from the following decisions: *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 147 (3d Cir. 1999); *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993); *Senn v. United Dominion Indus. Inc.*, 951 F.2d 806, 816 (7th Cir. 1992); *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767, 770 (8th Cir. 2004). Two additional circuits appear in conflict. *See Turner v. Local Union No. 302, Int'l B'hd of Teamsters*, 604 F.2d 1219, 1225 (9th Cir. 1979) (benefits not vested when

Equally important, the Sixth Circuit's decision in this case deviates from the recent decisions of the Third and Fourth Circuits, which correctly interpreted *Tackett* and enforced general durational clauses. Whereas the lower court here construed *Tackett* as allowing a finding of ambiguity if the retiree health benefits were not subject to a specific durational clause, and when the CBA "ties" eligibility for retiree health benefits to eligibility for a pension, the Third and Fourth Circuits have interpreted *Tackett* to require enforcement of the general durational clause.

In *Grove v. Johnson Controls, Inc.*, — F. App'x —, 2017 WL 2590762 (3d Cir. 2017) (unpublished), the Third Circuit rejected vesting on the ground that "any obligation on Johnson Controls' part terminated with the expiration of the collective bargaining agreement." *Id.* at *3. Even for subclasses that were promised benefits until "Death," the CBA meant only that "no further benefits are available if [a retiree] dies before the agreement expires," but did not promise the benefits beyond expiration of the CBA. *Id.* at *4.

Likewise, in *Barton v. Constellium Rolled Products-Ravenswood, LLC*, 856 F.3d 348 (4th Cir. 2017), the Fourth Circuit held that the "explicit

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"[n]one of the documents establishing the health and welfare benefits made any representation as to the length of the period during which these benefits would continue to be paid, other than 'throughout the term of this agreement'"); *Coffin v. Bowater, Inc.*, 501 F.3d 80, 97 (1st Cir. 2007) (retirees not entitled to lifetime health coverage under CBAs containing unambiguous durational clause for benefits).

durational language stating that the retiree health benefits continue 'for the term of' the governing CBA" precluded vesting. *Id.* at 352. Although the retirees asserted that other provisions of the CBAs and the Summary Plan Descriptions issued for their benefits created ambiguities about vesting, the Fourth Circuit repeatedly invoked the "robust durational language" as precluding vesting. *Id.* at 355.

The Sixth Circuit's ascertainment of an ambiguity cannot be reconciled with the instruction of *Tackett* to give effect to the durational clause or the decisions in *Grove* and *Barton* adhering to that instruction. Grant of the petition is necessary to resolve these conflicts among the circuits.

B. The Sixth Circuit's Decision Also Creates a Conflict Among Decisions Within the Sixth Circuit.

As Judge Richard Allen Griffin recently wrote, the Sixth Circuit's "post-*Tackett* case law is a mess," and its "decisions are in irreconcilable conflict." *Kelsey-Hayes*, No. 15-2285, slip op. at 5, 6 (Griffin, J. dissenting from denial of rehearing). Although it is the duty of each circuit to maintain uniformity among its own decisions through the en banc process, *see* Fed. R. App. P. 35(a)(1) ("secur[ing] or maintain[ing] uniformity of the Court's decisions" is ground for en banc consideration), the Sixth Circuit has steadfastly refused to reconcile its post-*Tackett* decisions.

The conflicts began almost immediately after this Court remanded *Tackett* to the Sixth Circuit with instructions to "apply ordinary principles of

contract law." 135 S. Ct. at 937. On remand, the Sixth Circuit remanded the case back to the district court. *Tackett III*, 811 F.3d 204. In so doing, however, the Sixth Circuit ventured a number of propositions that have sown confusion and discord into subsequent decisions.[7] For example, the court opined that "we ... cannot presume that the absence of such specific language [in a general durational clause], by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest." *Id.* at 208, 209.

In three decisions, the Sixth Circuit has properly interpreted *Tackett* and held that, in the absence of specific language vesting the benefits, the durational clauses precluded vesting. In *Gallo v. Moen*, 813 F.3d 265 (6th Cir. 2016), the court reversed a lower court summary judgment ruling that the benefits were vested and held as a matter of law that the CBA precluded vesting for a number of reasons. It emphasized "[f]irst and foremost" that the agreement lacked language promising vested benefits. *Id.* at 269. It also relied on the three-year durational clause. *Id.* at 269–70. Also relevant here, it rejected the retirees' argument that the "tying" of eligibility

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[7] The Sixth Circuit is divided on the precedential effect of *Tackett III*. *Compare Reese III*, App. 13 (relying on *Tackett III*, and suggesting that *Tackett III* "must govern" when in conflict with *Gallo*), *with Kelsey-Hayes*, slip op. at 6 (Griffin, J. dissenting from denial of rehearing) ("despite these overarching pronouncements, we did not substantively address the CBA at issue" in *Tackett III*); *and Kelsey-Hayes*, 854 F.3d at 873–74 (Gilman, J. dissenting) ("much of *Tackett III*'s language is therefore dicta because the discussion of contract principles was not necessary to the remand ruling.").

for retiree health benefits to eligibility for a pension suggested vesting, deeming that argument a "relic of a misdirected frame of reference" during the *Yard-Man* era. *Id.* at 272. Since the contract documents were unambiguous, the court declined to consider extrinsic evidence. And it pointed out that its decision "brings our court into alignment with other circuits around the country." *Id.* at 271.

Several months later, on the very same day it issued the decision at issue here, the Sixth Circuit decided *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017), *cert. pending*, No. 17-413 (docketed Sept. 19, 2017). *Cole* followed *Tackett* and deemed *Gallo* "materially indistinguishable from the facts before us" and reached the same conclusion that the benefits were not vested.[8] It reasoned that the retiree health benefits had no specific durational clause and therefore were subject to the general durational clause. *Id.* at 700. As in *Gallo*, the court declined to consider extrinsic evidence because "the language of the 2000 CBA is unambiguous." *Id.* at 701.

More recently, the Sixth Circuit decided *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206 (6th Cir. Sept. 1, 2017), applying the law of Michigan, which has embraced *Tackett*. *Id.* at *6. The court distinguished the decision here on the ground that "the CBA in *Reese III* carved out health insurance as a benefit that ended at a different time than other benefits, rendering the duration of that

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[8] Because the *Tackett III* panel "did not resolve the merits of the case" before remanding it, the *Cole II* court correctly declined to follow the *Tackett III* panel's observations. *Cole*, 855 F.3d at 699.

benefit ambiguous." *Id.* at *7. These specific limits in *Reese III* were "coupled with evidence of tying" of health benefit eligibility to pension eligibility. *Id.* at *8. The court also noted that "evidence of tying cannot create an ambiguity where none would otherwise exist." *Id.* Accordingly, the court in *Serafino* enforced the general durational clauses and held the benefits not vested.

The same day it decided *Reese III* and *Cole*, on 20 April 2017, the Sixth Circuit decided *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), holding that the retirees' benefits *are* vested. Again, the court invoked the view in *Tackett III* that a general durational clause does not say "everything" about the intent to vest. *Id.* at 867. The court recognized that the benefits "were expressly subject to the CBA's duration clause," but ultimately determined that "[m]ultiple ambiguities plague our interpretation of the 1998 CBA." *Id.* at 867–68. In particular, the CBA barred "unilateral modification," and thus, according to the court, "the applicability of the general durational clause to the duration of health care benefits raises some ambiguities." *Id.* at 868. The court also found "latent ambiguities throughout the 1998 CBA itself." *Id.* at 869. Turning to "the mountain of extrinsic evidence," the court held the benefits vested. *Id.*

In short, as in this case, the aggressive and creative search for ambiguities in *Kelsey-Hayes* negated a clearly applicable durational clause, and conflicts with this Court's holding in *Tackett*. Thus, the rulings in this case and *Kelsey-Hayes* are in direct conflict with the Sixth Circuit's own decisions in

Gallo, *Cole*, and *Serafino*. To date, the Sixth Circuit has declined to consider any of the decisions en banc to resolve the conflicts between *Gallo*, *Cole*, and *Serafino*, on the one hand, and this case, *Tackett III*, and *Kelsey-Hayes*, on the other.

This confused state of play has led, predictably, to inconsistent results among the district courts within the Sixth Circuit. *Compare Sloan v. BorgWarner, Inc.*, No. 09-cv-10918, 2016 WL 7107228 (E.D. Mich. Dec. 5, 2016) (following *Tackett* and *Gallo* to reject vesting on summary judgment); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15-CV-2301, 2017 WL 3219728 (N.D. Ohio Jul. 28, 2017) (appeal pending No. 17-3885) (relying on *Gallo* to grant General Electric's motion to dismiss on the vesting issue); *and Watkins v. Honeywell Int'l, Inc.*, No. 3:16-CV-01925, 2016 WL 7325161, at *7 (N.D. Ohio Dec. 16, 2016) (relying on *Gallo* to hold contracts did not promise vested benefits and granting motion to dismiss complaint seeking such benefits), *with Zino v. Whirlpool Corp.*, No. 5:11-CV-1676, 2017 WL 3219830 (N.D. Ohio Jul. 27, 2017) (appeal pending No. 17-3851/3860) (distinguishing *Gallo* and relying on *Reese III* and *Kelsey-Hayes* to hold that "there are various ambiguities in the contracts" precluding reliance on the general duration clause, and denying motion to reconsider decision holding benefits vested); *Fletcher v. Honeywell Int'l, Inc.*, No. 3:16-cv-302, 2016 WL 6780020 (S.D. Ohio Nov. 15, 2016) (relying on *Tackett III* and distinguishing *Gallo* to deem contract ambiguous and deny motion to dismiss retirees' claim for vested health benefits); *and Fletcher v. Honeywell Int'l, Inc.*, 238 F. Supp. 3d 992, 994, 1008 (S.D. Ohio

2017) (appeal pending No. 17-3277) (after evidentiary hearing, and incorporating ruling on motion to dismiss, holding benefits vested).

The refusal of the Sixth Circuit to resolve the "mess" in its post-*Tackett* decisions leaves for this Court the task of returning the law to ordinary principles of contract law by granting review of this Petition.

III. THIS CASE SQUARELY PRESENTS BOTH THE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS ON A FULLY-DEVELOPED RECORD.

As shown, the decision below conflicts with long-standing precedent on vesting from other circuits as well as more recent precedent from other circuits interpreting *Tackett*. It also directly presents the existing intra-circuit conflict within the Sixth Circuit about the meaning of *Tackett*. By granting this petition, the Court can resolve a multitude of conflicts.

In addition, it can also provide certainty to retirees about the benefits to which they are contractually entitled, and provide critical guidance to employers about their obligations. It can circumvent a return to the forum shopping spawned in *Yard-Man*, which led the plaintiffs in this case to choose a foreign forum, where they had never worked and where CNH has never had any facilities, solely for the purpose of taking advantage of the more favorable law of vesting.

Moreover, after extensive discovery, four summary judgment decisions by the district court, three decisions by the Sixth Circuit, and two remand proceedings, the record in this case is complete and the issues well-posed. As the Sixth Circuit wrote in its second decision over five years ago, "[t]his long-running dispute needs to come to an end, and it is particularly unfair to prolong the dispute when the status quo [continuation of the benefits] not only favors just one party but also risks mooting the economic stakes of the case for the other party." *Reese II*, 694 F.3d at 685. That statement is even more true today.

CONCLUSION

For the reasons set forth above, CNH Industrial N.V. and CNH Industrial America LLC urge the Court to grant the petition for a writ of certiorari and schedule the case for briefing and argument.

Respectfully submitted,

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October 3, 2017

APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0092p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed April 20, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN, *Plaintiffs-Appellees*,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIAL AMERICA, LLC, *Defendants-Appellants.*	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:04-cv-70592—
Patrick J. Duggan, District Judge.

Argued: October 19, 2016

Decided and Filed: April 20, 2017

Before: GIBBONS, SUTTON, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Bobby R. Burchfield, KING & SPALDING LLP, Washington, D.C., for Appellants. Darcie R. Brault, MCKKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Appellees. **ON BRIEF:** Bobby R. Burchfield, KING & SPALDING LLP, Washington, D.C., for Appellants. Darcie R. Brault, MCKKNIGHT, CANZANO, SMITH, RADTKE & BRAULT, P.C., Royal Oak, Michigan, for Appellees. Douglas A. Darch, BAKER & MCKENZIE LLP, Chicago, Illinois, for Amicus Curiae.

GIBBONS, J., delivered the opinion of the court in which DONALD, J., joined in the judgment. DONALD, J. (pg. 15), delivered a separate opinion concurring in the result. SUTTON, J. (pp. 16–24), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Defendants-appellants CNH Industrial N.V. and CNH Industrial America LLC (collectively "CNH") appeal the district court's order granting plaintiffs' motion for reconsideration. The trial court reversed its grant of summary judgment for CNH and instead granted summary judgment for plaintiffs. In this appeal, CNH again asks this court to find that plaintiffs' right to lifetime healthcare benefits failed to vest. If, however, we were to find that plaintiffs' right had vested, CNH

believes the district court erred in finding that CNH's proposed changes were not "reasonably commensurate" with plaintiffs' current plan.

This matter is complicated by a change in the law since this long-running litigation began. In light of *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), which abrogated this circuit's *Yard-Man* line of cases, the district court had to revisit the question of whether plaintiffs had a vested right to lifetime healthcare benefits. The court ultimately found that they did. Because we find that the CBA is ambiguous, and because the extrinsic evidence indicates that parties intended for the healthcare benefits to vest for life, we affirm the district court's vesting determination. Remand to the district court is proper, however, because it failed to properly weigh the costs and the *benefits* of the proposed plan, as instructed by *Reese II*.

I.

This case's long and complicated factual and procedural history has been recounted several times by this court and by the district court. Plaintiffs, former employees of CNH who retired between 1994 and 2004, filed suit in the Eastern District of Michigan in 2004, seeking a declaration that they were entitled to lifetime healthcare benefits, an injunction requiring CNH to "maintain the level of retiree health care benefits currently in effect," and damages for injuries the retirees might sustain if the benefits were terminated. *Reese v. CNH Am. LLC*, 574 F.3d 315, 319 (6th Cir. 2009) (*Reese I*). In 1971, CNH (then known as Case Corporation) and the United Automobile, Aerospace, and Agricultural Workers of America ("UAW") entered

into a collective-bargaining agreement ("CBA"), in which CNH agreed "to provide health-care insurance to its retired employees and their spouses who were receiving a [pension or a spouse's pension]" from the company. *Id.* at 318. "From 1974 through 1995, each CBA (in three- or four-year terms) renewed this commitment in 'substantially unchanged' form, and each CBA provided that employees did not have to pay premiums in order to receive coverage." *Id.* (internal citations omitted).

In 1998, CNH and UAW entered into the CBA that generated this lawsuit. *Id.* That CBA was in effect until May 2, 2004, and provided that:

> Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs.

Id. The paragraphs that followed listed the "Medical" and "Prescription Drug" benefits available to all classes of covered retirees regardless of the duration of their service before retirement. *Id.* "The CBA does not spell out what 'Medical' benefits are included; it just says that eligibility for specific coverage will be based on each plan's eligibility requirements, and goes on to note that no contributions . . . are required for the Health Care Plans . . . ." *Id.* (internal quotations and citations omitted.)

Ultimately, the district court and the *Reese I* court faced two questions: "Did [CNH] in the 1998 CBA agree

to provide health-care benefits to retirees and their spouses for life? And, if so, does the scope of this promise permit CNH to alter these benefits in the future?" *Reese v. CNH Am. LLC*, 694 F.3d 681, 683 (6th Cir. 2012) (*Reese II*). In *Reese I*, this court answered both questions in the affirmative, but remanded to the district court so that it could determine "how and in what circumstances CNH may alter [the healthcare benefits] . . . ." *Reese I*, 574 F.3d at 327. On remand, the district court failed to reach the reasonableness question and did not create a factual record upon which this court could rule. *Reese II*, 694 F.3d at 683. Instead, it found that CNH could not unilaterally make changes to the scope of plaintiffs' healthcare benefits, which was in conflict with our commands in *Reese I*. Thus, the case was remanded to the district court again, this time with a list of seven factors to consider when making its reasonableness-of-the-proposed-plan determination and with clear instructions that CNH could make unilateral changes to the plan.[1] *Reese II*, 694 F.3d at 685–86.

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[1] The seven factors are:

> [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
>
> [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
>
> [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
>
> [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan?

While on this second remand, another unexpected wrinkle was added to this case when the Supreme Court abrogated this circuit's *Yard-Man* decision and its progeny. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 930 (2015) (*Tackett*). Because *Yard-Man* created an inference in favor of employees in collective-bargaining cases, *Reese I*, 574 F.3d at 321, the district court was required to reconsider whether plaintiffs had a vested right to lifetime healthcare benefits. Initially, the district court found that they did not, noting that it was "[c]onstrained by the Supreme Court's decision" in *Tackett*. (DE 445, Op. & Order, Page ID 16912.) However, on plaintiffs' motion for reconsideration, the district reversed course and found not only that plaintiffs' rights were vested even after *Tackett*, but also that CNH's proposed changes were unreasonable. Thereafter, CNH filed this timely appeal.

II.

We review the district court's grant of summary judgment *de novo*. *Domingo v. Kowalski*, 810 F.3d 403,

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How fast are CNH's per-beneficiary costs likely to grow under each?
[5] What difference (if any) is there between the quality of care available under the old and new plans?

[6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?

[7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Reese v. CNH Am., LLC, 694 F.3d 681, 685–86 (6th Cir. 2012) (*Reese II*).

410 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 542 (6th Cir. 2014)). Construing the evidence in the light most favorable to the nonmovant, *id.* (citing *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013)), summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Before the Supreme Court decided *Tackett*, the rights created by collective-bargaining agreements were reviewed with a thumb on the scale in favor of employees. *Tackett*, 135 S. Ct. at 935. This doctrine, known most commonly as the *Yard-Man* inference, was the law in this circuit for more than thirty years. And it was the law in effect when this court and the district court initially reviewed the rights at issue in this case. In *Tackett*, the Supreme Court abrogated the *Yard-Man* inference and instructed courts to apply "ordinary principles of contract law" when reviewing collective-bargaining agreements. *Id.* at 937. Thus, the Supreme Court found, despite *Yard-Man* and its progeny's claim to the contrary, that we had not been employing ordinary contract-interpretation principles. What is hard to disentangle, however, is how many, if any, of the contract principles created by the *Yard-Man* line of cases survive *Tackett*. Presumably, not every contract-interpretation principle found in those cases impermissibly relied on inferences in favor of employees. But, *Tackett* required us to revisit those old rules to weed out impermissible assumptions and inferences.

On remand from the Supreme Court, we interpreted the high Court's instructions, and noted the following, non-exhaustive list of ordinary principles of contract law:

> • [A]s with any other contract, the parties' intentions control.
>
> • Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.
>
> • Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case.
>
> • [T]he written agreement is presumed to encompass the whole agreement of the parties.
>
> • Courts [should] avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract. . . . [A] promise that is "partly" illusory is by definition not illusory.
>
> • [C]ourts should not construe ambiguous writings to create lifetime promises. . . . [C]ontracts that are silent as to their duration will ordinarily be treated not as "operative in perpetuity" but as "operative for a reasonable time."

> • [T]raditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation.
>
> • Contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.
>
> • When a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

Tackett v. M & G Polymers USA, LLC, 811 F.3d 204, 208 (6th Cir. 2016) (*Tackett III*) (citing *Tackett*, 135 S. Ct. at 933–37). The *Tackett III* court went on to cite additional principles highlighted by Justice Ginsburg's concurrence:

> • Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.
>
> • [W]hen the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. . . . [F]or example, the parties' bargaining history.
>
> • No rule requires "clear and express" language in order to show that parties intended health-care benefits to vest.
>
> • Constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may be derived from the agreement's "explicit terms," but they may arise

> as well from implied terms of the expired agreement.

Id. at 208–09 (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)). "Importantly," *Tackett III* noted, "the Court rejected *Yard-Man*'s inferences in favor of retirees, but also declined to adopt an 'explicit language' requirement in favor of companies." *Id.* at 209 (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 203, 207 (1991) ("[A] collective-bargaining agreement [may] provide[ ] in explicit terms that certain benefits continue after the agreement's expiration," but nevertheless, "constraints upon the employer after the expiration date of a collective-bargaining agreement . . . may arise as well from the express or implied terms of the expired agreement itself."). Thus, relying heavily on Justice Ginsburg's concurrence, *Tackett III* removed presumptions in favor of vesting, but also explicitly declined to shift that presumption to the employer.

The *Tackett III* court then proceeded to discuss what effect the absence of any durational language has on the vesting of rights. It held that:

> [W]hile the Supreme Court's decision [in *Tackett*] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

Tackett III, 811 F.3d at 209. The *Tackett III* court highlighted that the retirees in that case acknowledged that the agreements at issue lacked clear and express language vesting benefits, but still remanded the case to the district court so that it could determine whether certain documents were part of the agreements or "may otherwise serve as extrinsic evidence." *Id.* at 210 & n.3.

While, in some cases, the presence of a general-durational clause will cure any ambiguity as to the duration of benefits, *see Gallo v. Moen, Inc.*, 813 F.3d 265, 268 (6th Cir. 2016) (finding that, due to the lack of a specific end date, the CBA's healthcare benefits should be governed by agreement's general-durational clause), the general-durational clause here does not. This is so because the parties in this case carved out certain benefits, such as life insurance and healthcare insurance, and stated that those coverages ceased at a time different than other provisions of the CBA. True, this provision says only that healthcare coverage continues past the date of retirement and is silent on whether the benefits continue past the termination date of the agreement. But, when read in conjunction with the whole instrument, as *Tackett III* commands, this silence, rather than resolving ambiguity, furthers it. We cannot, and should not, presume that the general-durational clause here says everything about the parties' intentions. *Tackett III*, 811 F.3d at 209.

To find ambiguity in this case, partially from the silence as to the parties' intentions, does not offend the Supreme Court's mandate from *Tackett* that we not infer vesting from silence. There is surely a difference between finding ambiguity from silence and finding vesting from silence. The latter is impermissible after

Tackett; the former permits the court to turn to extrinsic evidence to determine the intent of the parties—precisely the goal in any contract dispute.

Further, just as the Supreme Court has commanded that we not infer vesting from silence, it has directed us not to infer vesting from the tying of benefits to achievement of pensioner status. But, as with silence, it has not directed us to ignore tying's ability to create ambiguity. Here, healthcare benefits were tied to pension eligibility. This, by itself, says little about whether those healthcare benefits should vest for life. It does, however, create an ambiguity about the parties' intentions. Inferring vesting from tying alone violates *Tackett* and ordinary principles of contract interpretation. Finding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended. This, as with silence, does not offend any principle of contract interpretation. Instead, it moves us closer to the ultimate goal in any contract dispute: discovering the parties' true intentions. *See Tackett III*, 811 F.3d at 208 (holding that the "cardinal principle of contract interpretation" should govern: what were the parties' intentions?) (citing *Tackett*, 135 S. Ct. at 937–38 (Ginsburg, J., concurring)).

Silence as to the duration of retiree healthcare benefits, when combined with those benefits' coupling to pensioner status and their segregation from other entitlements in the CBA, overcomes any presumption that the general-durational clause should govern. *See id.* (noting also our limitation on presuming that a general-durational clause, by itself, conclusively answers the question of vesting). If these elements

were not present, or if the CBA clearly stated that the general-durational clause was intended to govern healthcare benefits, the CBA would most likely be unambiguous. But this is not the case, and *Tackett III* prohibits us from relying exclusively on the general-durational clause to resolve this matter.[2] Here, presuming that the CBA's general-durational clause says everything about the parties' intentions ignores evidence, taken from the whole instrument, indicating that the parties may have intended the benefits to extend beyond the end of the CBA. Giving dispositive weight to the general-durational clause here would move the thumb from the employees' side of the scale and place it on the side of employers. *Tackett*, however, sought to create a level playing field, not to foster an equally inequitable one. Accordingly, we reach the extrinsic evidence in this case to determine the parties' intent.

The district court previously reviewed the extrinsic evidence and found that the plaintiffs' rights had vested. The record supports the district court's finding. For example, in an accounting document, CNH calculated the costs of certain retirees' benefits, and when determining healthcare costs, based the figure on

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[2] To the extent that *Tackett III* and *Gallo* are in conflict—a dispute about which reasonable minds may differ—*Tackett III*, being first in time, must govern. To so hold is not an endorsement of *Tackett III*'s reasoning nor is it an indictment of *Gallo*'s; rather, it simply demonstrates adherence to this court's precedent. *Darrah v. City of Oak Park*, 255 F.3d 301, 309–10 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also* 6th Cir. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.").

the employees' life span. It is unlikely that an employer would base the future cost of supplying an employee with healthcare insurance on the employee's life span, as CNH did here, if that employer knows that its healthcare obligations expire at a fixed date. Further, CNH representatives repeatedly told the company's employees that retirees would have healthcare coverage for their lifetimes. For example, in a June 18, 1990 letter to Reba Williams, the spouse of a deceased retiree, CNH informed her she would have medical insurance "coverage[] for [her] lifetime." (DE 153, Exh. 61.) And CNH intended to provide group insurance coverage to the spouses of retirees "in a consistent manner" to the way it handled Williams's claim. (DE 154, Exh. 62.) These and other examples in the record indicate that CNH, the retirees, and the retirees' spouses, intended and expected that the healthcare benefits provided were vested for life.

However, unless a CBA says otherwise, the vesting of healthcare rights does not prevent reasonable modifications to those rights. *Reese I*, 574 F.3d at 325. Thus, we must consider whether CNH's proposed changes are reasonable. In *Reese II*, we remanded this case to the district court so that it could consider, again, whether the proposed changes to plaintiffs' plans were reasonable. *Reese II*, 694 F.3d at 683. In so doing, we listed seven non-exhaustive factors that the district court should consider. *Id.* at 685–86. Those factors were:

> [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)?

> What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
>
> [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
>
> [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
>
> [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
>
> [5] What difference (if any) is there between the quality of care available under the old and new plans?
>
> [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
>
> [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. On remand, and after reconsidering whether plaintiffs' rights had vested, the district court proceeded to consider these factors. It grouped the first five together and stated that these factors all pertain to comparing the proposed plan to the current plan. The district court then considered the two remaining factors at the end of its analysis: a comparison of the proposed plan to the plans CNH offers current employees and

retirees and a comparison of CNH's proposed plan to other similar companies' plans.

The district court ultimately concluded that CNH's proposed plan was not reasonably commensurate with the current plan, relying primarily, if not exclusively, on the first five factors—specifically, the increased costs to plaintiffs under the proposed plan. The district court found that plaintiffs and current employees and retirees "are in roughly similar positions in terms of their healthcare situation," but yet found that this factor did not weigh strongly in favor of either party. It also found the final factor—the comparison between CNH's proposed plan and the plans offered by similar companies—did not weigh in favor of either party, and in its reasoning questioned the utility of this factor.

The district court's analysis erred in several ways, and remand is necessary to address these mistakes. *Reese II* made clear that the district court was to consider not only any increased costs to plaintiffs, but also any additional benefits that inured to them. *Reese II*, 694 F.3d at 685. Specifically, we asked the district court to determine if "the retirees' benefits differ in material respects from those offered to current employees and people retiring today," and whether the proposed changes to the plan "are reasonable in light of changes in health care (including access to new medical procedures and prescriptions)." *Id.* (internal quotations and citations omitted). Thus, while the district court held that the two plans provide roughly the same "quality of care" because both provide coverage for "medically necessary" procedures, this ignores that, before a procedure can be medically necessary, it must be medically possible. As we noted in *Reese II*, "[n]ew

and better medical procedures arise while others become obsolete. And it is the rare medical innovation that costs *less* than the one it replaces." *Reese II*, 694 F.3d at 683. Thus, "[r]etirees, quite understandably, do not want lifetime eligibility for the medical-insurance plan in place on the day of retirement, even if that means they would pay no premiums for it." *Id.* at 683–84. Instead, "[t]hey want eligibility for up-to-date medical-insurance plans, all with access to up-to-date medical procedures and drugs." *Id.* at 684. The district court's failure to consider the increased benefits, along with the increased costs, necessitates remand.

The district court focused heavily on cost-shifting provided for in the proposed plan. It did so with good reason: many of the *Reese II* factors dealt with changes in costs for CNH and for plaintiffs. In considering those changes in costs, however, the district court made several mistakes. For those Medicare-eligible plaintiffs, the district court considered only the costs shifted away from CNH, and apparently presumed that plaintiffs would foot this entire bill. Of course this is not true; a substantial portion of the costs shifted to Medicare-eligible plaintiffs will be covered by the federal government. Thus, the true cost-shifting is less than that highlighted by the district court.

The district court also erred by focusing too heavily on the future increased costs to non-Medicare-eligible plaintiffs. No plaintiff-retiree, and very few plaintiff-spouses, will be ineligible for Medicare in 2032. Thus, the most dramatic cost-shifting under the proposed plan is more paper tiger than realistic expectation. There are, however, thirteen plaintiffs—very young spouses of retirees—who would be ineligible for

Medicare in 2032. These unlucky thirteen would be subject to drastic increases in costs for their healthcare, and the district court refused to ignore them in its reasonableness analysis. Although it was right to acknowledge this small subset of the class, the district court placed an undue amount of weight on their costs. In any institutional setting, there will be certain members who are harmed by policy decisions. These thirteen spouses fall into that camp.

Because the proposed plan was materially similar to the plan offered to current employees and retirees, while being less expensive to plaintiffs, the district court further erred in finding that this factor did not favor either side. First, the mere fact that the proposed plan was equal in substance to the plan offered to current employees and retirees weighs in favor of reasonableness. *Reese II* asked the district court "[w]hat difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?" *Reese II*, 694 F.3d at 686. Thus, this reasonableness benchmark asked the district court to determine if the proposed plan was similar to the current plans being offered by CNH. The district court found that it was. Second, not only does the proposed plan place plaintiffs in substantially the same position in terms of healthcare benefits as current employees and retirees, but plaintiffs also pay less for these same benefits.

The district court was motivated to find this factor in equipoise by looking to benefits that post-2004 employees and retirees received outside the healthcare-benefit context. For example, while their premiums are higher than those under the proposed plan, current

employees and retirees also receive higher pensions and a one-time contribution to a health-savings account. Requiring consideration of these benefits, subsequently bargained for by UAW and CNH, would essentially grandfather all past-retirees into the new CBA from which they were explicitly excluded. Requiring an equal increase in plaintiffs' healthcare benefits for every benefit or concession won by current CNH employees is not part of the *Reese II* framework. The proposed plan must offer healthcare benefits similar to those received by current employees and retirees. It does not have to exceed this requirement to compensate plaintiffs for benefits to which they are not entitled. To do so would be not only unfair to CNH but also could have adverse consequences on future collective-bargaining agreements.

Finally, the district court erred in determining whether the proposed plan was reasonable in light of changes to healthcare. This factor asked the district court to review plans offered by "companies similar to CNH and with demographically similar employees." *Reese II*, 694 F.3d at 686. The district court discounted the utility of this factor, noting that "[n]aturally, the proposed plan will compare favorably to some plans and not to others, and the parties will surely locate the plans that support their respective litigation-induced positions and select those plans as comparators." (DE 450, Op. & Order, Page ID 17031.) Yet, even though it acknowledged the inherent biases of the parties' "cherry-picked" plans, the district court still used plaintiffs' comparator as the basis for its decision. (*Id.* at 17030, 17031.) It is true that the last factor is less than clear about what qualifies as a "similar company" or what exactly is meant by "demographically similar

employees," but this does not warrant ignoring as irrelevant the aggregate data of 900 companies. Many of these companies are large corporations (Ford, General Motors, AT&T, etc.) that are similar to CNH, and, while not perfect comparators, this aggregate data is worthy of consideration.

The district court also held that it could not consider the reasonableness of the proposed plan in piecemeal fashion. CNH challenges this holding and urges us to remand so that the district court can examine the proposed plan in this way. There is no law directly on point, and neither *Reese I* nor *Reese II* addresses this directly. There is language in both cases, however, that suggests that the court could permit the district court to sever the proposed plan and address each part individually. CNH claims *Reese I* supports its position that the terms of the proposed plan may be severed and examined individually. Specifically, it says that *Reese I*'s direction to the district court "to decide how and in what circumstances" CNH may alter such benefits suggests that the court may sever the terms. *See Reese I*, 574 F.3d at 327. Although not cited by CNH, language in *Reese II* also suggests that the terms may be severed. There, the court held that the reasonableness inquiry here "is a vexing one" and that "if the parties cannot resolve the [issues] on their own, we (and the district court) will do our best to resolve it for them." *Reese II*, 694 F.3d at 686. Thus, we see no reason why the district court cannot examine individual terms of the proposed plan for reasonableness. And, allowing the district court to determine which terms are reasonable, and which are not, might facilitate the settlement process between the

parties and could lead to a quicker resolution of this long-running litigation.

On remand, the district court should reconsider the factors presented in *Reese II*, with special attention on the increased benefits to plaintiffs—including those benefits created by progress in medical procedures and prescriptions. The district court should also consider how much of the cost to Medicare-eligible retirees will be borne by the federal government or others. And lastly, the district court should reconsider whether the proposed plan is reasonable in light of the plans offered at similar companies—*i.e.*, large manufacturing corporations with union representation.[3] It should also look to the individual terms proposed and determine, if not reasonable on the whole, whether individual pieces of the plan are reasonable.

IV.

For the reasons stated above, we affirm the district court's finding that plaintiffs' right to lifetime healthcare benefits vested. Remand is necessary, however, so that the district court can reconsider the reasonableness of CNH's proposed plan in light of *Reese I*, *II*, and the instructions they provide.

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[3] The "demographically similar employees" language from this *Reese II* factor must do some work, and we believe comparing collectively-bargained-for agreements to collectively-bargained-for agreements, coupled with limiting the inquiry to large manufacturing corporations, will help ensure that the comparators are similar to CNH.

CONCURRENCE

BERNICE BOUIE DONALD, concurring. I agree with the lead opinion as to affirming the district court's vesting determination and, so, concur in the judgment. I write separately, however, to reassert my disagreement with this Court's previous determination that despite a lifetime vesting, CNH may unilaterally modify the scope of the retirees' healthcare benefits.

In *Reese I*, the Court held that "to the extent [the district court] suggests that these benefits must be maintained precisely at the level provided for in the 1998 CBA, it is not supported by the 1998 CBA, extrinsic evidence provided by the parties or common sense." *Reese I*, 574 F.3d at 327. The converse, that CNH may "reasonably" alter these benefits, however, is not supported by this Court or Supreme Court precedent. As I noted in my dissent in *Reese II*, "[s]everal decisions of this Court, as well as Supreme Court precedent, express the principle that, once a retiree's health care benefits have vested for life, an employer's unilateral modification of the scope of those benefits is a violation of the Labor Management Relations Act." *Reese II*, 694 F.3d at 687 (citing *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 187, 181 n.20 (1971); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006)). My review of this issue and the relevant law, unchanged by the Supreme Court's decision in *Tackett*, causes me to continue in my belief that because we have found that the retirees' healthcare benefits vested for life, "the

level of those benefits must be deemed vested in scope and *not* subject to unilateral modification by CNH." *Reese II*, 694 F.3d at 688.

Considering, however, the well-established law-of-the-case doctrine, *see Caldwell v. City of Louisville*, 200 F. App'x 430, 432–33 (6th Cir. 2006) ("The law-of-the-case doctrine precludes reconsideration of issues decided at an earlier stage of the case"), I recognize the limitations—although not the impossibility—in reaching a result that is inconsistent with that reached at this Court's first review of this case.

DISSENT

SUTTON, Circuit Judge, dissenting. In a 9–0 decision reversing our court in *M & G Polymers USA, LLC v. Tackett*, the Supreme Court asked us to do two things: (1) to interpret collective bargaining agreements "according to ordinary principles of contract law," and (2) to stop using the extraordinary *Yard-Man* "inferences," which had "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." 135 S. Ct. 926, 933, 935 (2015). With the unanimous overruling of *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), those twin directives became one: apply normal rules of contract interpretation to promises with respect to healthcare benefits.

Because our court had long insisted that the *Yard-Man* inferences sprang from ordinary contract law, the Supreme Court proceeded to guide us about what counts as an ordinary contract principle and what does not. The Court told us to respect "general durational clauses" in collective bargaining agreements, reminded us that "courts should not construe ambiguous writings to create lifetime promises," and directed us that, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* at 936–37.

These principles should make quick work of this case. In this collective bargaining agreement, the company never promised to provide healthcare benefits for life, and the agreement contained a durational

clause that limited *all* of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement. In every other circuit in the country, that would end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would.

Not here. The court concludes that the company made a lifetime commitment to provide healthcare benefits as a matter of law. Is this the application of "ordinary principles of contract law"? I am dubious. I know of no other area of contract law in which an agreement's promises, subject to an uncontradicted durational clause, could be found ambiguous as to their duration—and then interpreted to last for life. The court's approach to this contract is ordinary only in this circuit and only in ways that contradict the Supreme Court's unambiguous directives about how to interpret such contracts. I respectfully dissent.

Several ordinary contract principles tell us how to resolve this case. One says that the four corners of the collective bargaining agreement are a good place to start. "Because 'the written agreement is presumed to encompass the whole agreement of the parties,' and because Congress has placed special emphasis on the 'written terms' of retiree healthcare plans, we must enforce those terms as written." *Gallo v. Moen Inc.*, 813 F.3d 265, 270 (6th Cir. 2016) (quoting *Tackett*, 135 U.S. at 936, 933), *cert. denied*, 137 S. Ct. 375 (2016); *see also* 29 U.S.C. § 1102(a)(1). In this instance, the key is what the agreement does and does not say. It *never* promises lifetime healthcare benefits. What *is* written are two things: a specific promise of retiree healthcare benefits

and a general durational clause that ends the entire agreement on "May 2, 2004." That means the benefit lasts as long as the commitment—until May 2, 2004.

Reinforcing that conclusion is another traditional principle. "[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991); *see Tackett*, 135 S. Ct. at 937. This agreement does not contain any written terms saying that healthcare benefits are excepted from the durational clause. Just the opposite: The agreement says that the Group Benefit Plan "*will run concurrently* with this Agreement and is hereby made a part of this Agreement." R. 439-4 at 45 (emphasis added). The durational clause, and the absence of any provision setting a time frame for healthcare benefits, is all anyone needs to know to decide this case. The benefits do not last beyond May 2, 2004, because the agreement did not promise them beyond that date. Any other approach to the issue, *Tackett* explained, "distort[s] the text" of the agreement by "refus[ing] to apply general durational clauses to provisions governing retiree benefits." 135 S. Ct. at 936.

A third principle cements this conclusion. "[W]hen a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Id.* at 937. In this case, the healthcare-benefits promise is silent as to the length of the commitment, and the agreement contains an expiration date of six years. That means the promise ends on May 2, 2004, unless and until the parties agree to extend it in the next collectively bargained agreement (just as they had so often done in the past).

Last but not least is this: Even if there were no durational language, even in other words if there were no six-year limit to the agreement, we still could not construe this agreement's commitments as lifetime promises. "[T]he traditional principle," *Tackett* noted, is "that courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936. "[C]ontracts that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time.'" *Id.* (quoting 3 A. Corbin, *Corbin on Contracts* § 553, p. 216 (1960)).

These principles should resolve this case. And they would resolve this case in every other circuit in the country. Before *Tackett*, ours was the only circuit that applied a presumption in favor of treating healthcare benefits as promises for life. *See Noe v. PolyOne Corp.*, 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part). The other circuits applied the just-mentioned rules of interpretation to contracts just like this one, confirming that these rules are indeed "ordinary," and thus respected the durational clauses in each of them. *See, e.g.*, *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000); *see also* Raymond A. Franklin, Note, *Vesting Retirement Benefits: Revisiting* Yard-Man *and Its Unacknowledged Presumption*, 25 J. Civ. Rts. & Econ. Dev. 803, 821–22 (2011). After *Tackett*, unsurprisingly, the other courts of appeals continue to enforce general durational clauses in similar agreements—including a unanimous Fourth Circuit decision from just a few weeks ago. *See*

Barton v. Constellium Rolled Prods.-Ravenswood, LLC, 851 F.3d 349, 354 (4th Cir. 2017); *see also Finley Hosp. v. NLRB*, 827 F.3d 720, 725 (8th Cir. 2016); *Michels Corp. v. Cent. States, Se., & Sw. Areas Pension Fund*, 800 F.3d 411, 421 (7th Cir. 2015).

There is one area, it's worth pointing out, in which *our circuit* has followed these traditional rules. Pre-*Tackett* and post-*Tackett*, we have honored these principles if the healthcare-benefits promise was contained in an employment agreement between an individual and the company, as opposed to a collectively bargained agreement. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc). That means we have applied a presumption in favor of lifetime vesting where it is needed least (company promises in which the employees were collectively represented by a union), not where it is needed most (company promises in which the employees have no representative). Notably, *Tackett* favorably cited Judge Nelson's decision in *Sprague*, suggesting we should apply the *same rules* in both settings. *Tackett*, 135 S. Ct. at 936–37.

I am hard pressed to understand our hesitance in following the path that the Supreme Court has set for us, that the other circuits have long followed, and that we have followed when it comes to non-collectively bargained agreements with respect to the *same* subject matter. In what area of contract law would we disregard a durational clause? I know of none. How, then, can this be the application of ordinary contract principles? I know not.

In abrading an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut,

the court with respect makes too much of the silence in the healthcare-benefits provision about the length of the commitment and too little of the durational clause's express limitation of these benefits to "May 2, 2004." Contractual ambiguity, it may be true, gives courts a warrant to search the record for extrinsic evidence of contractual meaning. But that warrant requires a textual finding unfound here—that there are two competing interpretations, both of which are fairly plausible readings of the language. *See TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 582–83 (6th Cir. 2010); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 425 (2012). Put differently, if there is only one fair reading of the agreement, that is the end of the matter.

So it should end here. Everyone agrees on one fair reading: that retiree healthcare benefits would last, like the rest of the promises in the agreement, until the contract expired on May 2, 2004. The majority offers another: that the contract promised retiree benefits for life. But the contract principles that the Court spelled out in *Tackett* do not permit that reading.

Consider the court's efforts to identify ambiguity and to resolve it in favor of a lifetime promise. It points to a provision in the Group Benefit Plan that says pension-eligible retirees "who retire . . . after 7/1/94" and their spouses "shall be eligible for the Group benefits as described in the following paragraphs [which include medical coverage]. All other coverages cease coincident with the date of employment termination due to retirement." R. 439-3 at 28. But this provision says only that healthcare coverage continues past the date of *retirement*. It does not say that benefits

continue past the termination date of the agreement, much less that they continue for life.

Silence about the length of this commitment, the court adds, supports a finding of ambiguity. In the court's words: "when read in conjunction with the whole instrument, . . . this silence, rather than resolving ambiguity, furthers it." Maj. Op. 7. But that is true only if we ignore what "the whole instrument" says. When read in conjunction with a durational clause that expressly limits all provisions of the agreement to six years, silence as to a benefits provision must submit to the durational clause, not override it.

Nor does this interpretation require us to "presume that [the] general durational clause says *everything* about the intent to vest." *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204, 209 (6th Cir. 2016); *see* Maj. Op. 8. That is a straw man. The durational clause sets an end date, hardly a surprise in a collective bargaining agreement, and that end date applies when nothing in the agreement contradicts it. No presumptions necessary. And no ambiguity. Silence on the duration of the retiree healthcare benefits means that the agreement's general durational clause is still the only provision specifying when those commitments terminate—May 2, 2004. *See Gallo*, 813 F.3d at 269–70. Any other approach is *Yard-Man* re-born, re-built, and re-purposed for new adventures.

The court is troubled that "[g]iving dispositive weight to the general-durational clause here would move the thumb from the employees' side of the scale and place it on the side of employers" and that "*Tackett* sought to create a level playing field, not to foster an

equally inequitable one." Maj. Op. 8–9. No worries there. As just shown, there is no risk in giving "dispositive weight" to an express general durational clause so long as courts honor express limits or extensions of promises in the agreement. More fundamentally, *Tackett* did not direct courts to give employees and employers an equal shot in litigation regardless of what their contract said; it ensured that collective bargaining agreements would be interpreted by the same, ordinary principles as other contracts. Equality between contracts, not between litigants faced with different contractual commitments. In any other area, we would say an uncontradicted general durational clause controls all of the promises in an agreement. If that puts a thumb on any side of the scale, it's because the text of the collectively bargained agreement put it there. And silence cannot lift it.

How, one might ask, does the court sidestep the Supreme Court's command that, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life"? *Tackett*, 135 S. Ct. at 937. Isn't that rule applicable here? Don't the court's repeated references to "silence" about the duration of the healthcare-benefits commitment implicate the rule? The majority demurs "because the parties in this case carved out certain benefits, such as life insurance and healthcare insurance, and stated that those coverages ceased at a time different than other provisions of the CBA." Maj. Op. 7. But that is a recycling of the point addressed above—that the agreement says that retiree healthcare benefits continue after the date of retirement, quite understandably, but not after the expiration date of the agreement. All the court has to go on to extend the

benefits past the end of the agreement, once again, is: silence. And under *Tackett*, we cannot infer vesting from silence.

The court next claims ambiguity about whether the healthcare benefits last a lifetime because eligibility for healthcare benefits is linked to pensions and because pensions are vested lifetime commitments. But the tying language in this contract has nothing to do with the duration of the healthcare benefits. The agreement says that pensioners "shall be eligible" for healthcare benefits *for as long as the agreement provides those benefits*—that is, until May 2, 2004—not for as long as retirees earn a pension. The court admits that the tying of healthcare benefits to pensioner status "by itself, says little about whether those healthcare benefits should vest for life. It does, however, create an ambiguity about the parties' intentions." Maj. Op. 8.

But if tying says little about vesting, how does it create ambiguity about vesting? I do not know. *Tackett* at any rate "rejected this kind of 'tying' analysis as a relic of a misdirected frame of reference, calling it one of many *Yard-Man* inferences that was 'inconsistent with ordinary principles of contract law.'" *Gallo*, 813 F.3d at 272 (quoting *Tackett*, 135 S. Ct. at 937). A forbidden inference cannot generate a plausible reading. And without a plausible explanation for treating the healthcare benefits promise as a promise for life, the general durational clause controls. We do not "expect to find lifetime commitments in time-limited agreements." *Gallo*, 813 F.3d at 269. To suppose that this agreement's tying language suggests lifetime vesting clearly enough to override an explicit durational clause is to find an elephant-sized

commitment in a linguistic mousehole. *See id.*; *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It doesn't fit, and it doesn't belong.

Because the retiree healthcare benefits expired on May 2, 2004, the extrinsic evidence invoked by the court is neither here nor there. Still, even setting aside the absence of a contractual ambiguity to resolve—even indeed setting aside the agreement's provision *precluding* use of parol evidence, R. 439-4 at 47—the extrinsic evidence does not support the court's position. Start with the parties' bargaining history. "The 1998 CBA not only set the rules for employees who retired during the next six years of that CBA; it also *reset* the rules for employees who retired after July 1, 1994, which is inconsistent with the notion that the 1990 and 1995 CBAs (using the same [retiree healthcare benefit] language as the 1998 CBA) created unalterable, irreducible health benefits." *Reese v. CNH Am. LLC*, 574 F.3d 315, 324 (6th Cir. 2009). After *Tackett*, that same logic shows a lack of vesting, which is exactly what we concluded in *Gallo*. That these benefits were reset (or "continued" as in *Gallo*) after prior agreements expired undermines a theory of vesting because it indicates that they would have to be reset again when this agreement expired. *See Gallo*, 813 F.3d at 270.

This bargaining history also casts a clarifying light on the accounting document that shows CNH planned to pay healthcare benefits for the life of the retiree. CNH and the union renewed retiree healthcare benefits in each successive agreement until this litigation began. All that the accounting document shows is that CNH expected that practice to continue

and forecast its budget accordingly. We dealt with exactly this situation in *Gallo*: "That a company to its credit hopes to subsidize healthcare benefits for its retirees for as long as possible does not mean it has promised to do so." 813 F.3d at 274. Taken in context, the accounting document shows only that CNH hoped and planned to pay lifetime healthcare benefits, not that it was contractually bound to do so. *See Witmer v. Acument Glob. Techs., Inc.*, 694 F.3d 774, 777 (6th Cir. 2012).

Nor is the remaining extrinsic evidence helpful, as most of it predates the relevant time period. The plaintiffs consist of retirees from between July 1, 1994 and April 1, 2005, and this dispute concerns what the company promised to that group. No amount of parol evidence regarding prior agreements, including promises made to workers who retired in the 1970s and '80s, is probative of the meaning of a set of distinct promises made by a new corporate parent for the first time in 1995, and then in altered form in 1998. The 1993 and 1995 "cap letters" showed that CNH planned to provide coverage beyond the term of the 1995 agreement, but again a commendable and hope-filled plan does not entail a binding commitment. We should reject this argument for the same reason the Fourth Circuit just rejected it: "The Cap Letters both fall far short of *Tackett*'s requirement for a clear signal that parties intend for benefits to vest and fail to negate the unambiguous durational language in [the agreement]." *Barton*, 851 F.3d at 356. The "Letter[s] of Understanding" that accompanied the 1998 agreement, moreover, reinforce the conclusion that the benefits were not vested. One letter provided that CNH could unilaterally alter benefits to reflect new healthcare

laws, and the other limited its promise to keep retiree costs constant to "the term of the 1998 labor agreement," R. 439-3 at 42. Even if admissible, the documents do not establish a lifetime right to healthcare benefits.

* * *

The conundrum of today's decision is that *Tackett* tells us to apply ordinary contract principles to these agreements, and yet every other court in the country would handle this case differently. I could double the length of this opinion with applicable quotes from other circuits but will offer just a few to make the point. Here's one circuit: "[E]ntitlements established by collective bargaining agreements do not survive their expiration or modification. . . . The mere silence of Collective Bargaining Agreements and plan documents concerning the vestment of welfare benefits fails to give rise to an ambiguity." *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806, 816 (7th Cir. 1992) (quotation omitted). And another: "Contractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation [of the right to alter health coverage]." *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). And another: "Promising to provide benefits for a certain period of time necessarily establishes that once that time period expires, the promise does as well. . . . Therefore, we conclude that this provision unambiguously establishes that once the CBAs expired, Multifoods was free to reduce retiree medical benefits." *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997). And another: "The most natural reading of a contract that

has defined endpoints of 1998 and 2001 is that terms in the contract apply to events between 1998 and 2001." *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767, 770 (8th Cir. 2004). And still another: "Silence on duration . . . may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *UAW v. Skinner Engine Co.*, 188 F.3d 130, 147 (3d Cir. 1999). And yet another: "The plain language of the CBA and SPD clearly indicates that the retiree health benefits did *not* vest [because the general durational clause] contains explicit durational language stating that the retiree health benefits continue 'for the term of' the governing CBA." *Barton*, 851 F.3d at 354.

Either our circuit or the rest of the country is not applying "ordinary principles of contract law" to these agreements. *Tackett*, 135 S. Ct. at 937. I fear that we, again, are out of step.

A last point, about the equities. No one likes the thought of ending healthcare benefits for retirees who have worked for much of their lives and who may not be able to take on new jobs now. But it is by no means clear that this is what would happen if we followed *Tackett* and ruled that the benefits did not vest. The absence of a contractual right to lifetime healthcare does not mean that these retirees will not receive healthcare benefits. Even aside from existing federal healthcare programs, there's no reason to think that the incentives that drove the company and the union to agree repeatedly on retiree healthcare benefits in the past will cease to drive the parties to make similar arrangements in the future. During oral argument, CNH confirmed that it intended, if it prevailed on the

vesting issue, to bring this class of retirees into a healthcare plan *that mirrors the one offered to current employees and more recent retirees*. At stake, then, is the plaintiffs' desire for *better* healthcare benefits than current employees and recent retirees. Whether that request is fair or not, equitable or not, it isn't what this collective bargaining agreement provides.

For these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed April 20, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN, Plaintiffs - Appellees,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIAL AMERICA, LLC, Defendants - Appellants.	)

Before: GIBBONS, SUTTON, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's vesting determination is AFFIRMED. IT IS FURTHER ORDERED that the case is REMANDED to the district court with instructions to properly weigh the costs and the benefits of the proposed plan in accordance with *Reese II*.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 04-70592
Honorable Patrick J. Duggan

[Filed November 9, 2015]

JACK REESE, JAMES CICHANOFSKY, ROGER MILLER, and GEORGE NOWLIN, on behalf of themselves and a similarly situated class

Plaintiffs,

v.

CNH INDUSTRIAL N.V. and CNH INDUSTRIAL AMERICA, LLC,

Defendants.

OPINION AND ORDER (1) GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION [ECF NO. 447]; (2) VACATING THE COURT'S SEPTEMBER 28, 2015 JUDGMENT [ECF NO. 446]; (3) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [ECF NO. 423]; (4) GRANTING

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF NO. 419]; AND DENYING AS MOOT PLAINTIFFS' MOTION TO STRIKE [ECF NO. 428]

On September 28, 2015, this Court issued a decision holding that the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), required the reversal of this Court's previous holding– affirmed by the Sixth Circuit Court of Appeals– that Plaintiffs are entitled to lifetime vested retiree health care benefits. *Reese v. CNH Industrial N.V.*, No. 04-70592, 2015 WL 5679827 (E.D. Mich. Sept. 28, 2015). The Court therefore entered a Judgment on the same date, ruling in favor of Defendants and against Plaintiffs. (ECF No. 446.) Plaintiffs filed a motion for reconsideration pursuant to Eastern District of Michigan Local Rule 7.1 on October 13, 2015. (ECF No. 447.) At this Court's invitation, Defendants (hereinafter "CNH") filed a response to Plaintiffs' motion. (ECF No. 449.) The Court concludes that it in fact committed a palpable error in its September 28, 2015 decision, the correction of which results in a different disposition of the case. *See* E.D. Mich. LR 7.1(h)(3). As such, the Court is vacating the Judgment entered on the same date and proceeding to rule on the motions it found moot as a result of holding that Plaintiffs' retiree health insurance benefits did not vest.

I. Plaintiffs' Motion for Reconsideration

The Court's palpable error can be summarized as follows. In its most recent motion for summary judgment on the issue of vesting, CNH correctly asserted that this Court and the Sixth Circuit

previously relied on inferences repudiated in *Tackett* when concluding that Plaintiffs are entitled to vested retiree health care benefits. CNH incorrectly asserted, however, that the only conclusion to be reached once those inferences are removed is that the parties intended Plaintiffs' retiree health insurance benefits to terminate with the 1998 Central Agreement. According to CNH, the Supreme Court in *Tackett* set forth "*new* rules of construction that now govern, in all circuits, the determination of whether retiree health benefits are vested." (ECF No. 439 at Pg ID 11606, emphasis added.) In fact, *Tackett* did not create new rules for construing collective bargaining agreements. Instead, the Supreme Court in *Tackett* simply rejected the inferences set forth in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), and its progeny, and reaffirmed that collective bargaining agreements are interpreted "according to ordinary principles of contract law . . .." *Tackett*, 135 S. Ct at 933. CNH failed to apply those ordinary principles of contract law to the relevant agreements in its motion for summary judgment– a mistake this Court repeated in reaching its September 28, 2015 decision. Now applying those principles, this Court concludes that Plaintiffs are entitled to vested retiree health insurance benefits.

As the Supreme Court re-emphasized in *Tackett*, a court's objective when interpreting any contract, including a collective bargaining agreement, is to "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Tackett*, 135 S. Ct. at 933 (quoting *Stolt-Nielsen*, 559 U.S. at 682) (" 'In this endeavor, as with any other contract, the parties' intentions control.' "). " 'Where the words of a contract

in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.' " *Tackett*, 559 U.S. at 682 (quoting 11 R. Lord, Williston on Contracts § 30:6, p. 108 (4th ed. 2012)). The Court is confident that it may rely on Justice Ruth Bader Ginsburg's elaboration of "ordinary contract principles" in her concurrence in *Tackett* (despite CNH's warning otherwise), particularly as Justice Ginsburg relies on the same treatise used by the majority as the source of these principles:

> Under the "cardinal principle" of contract interpretation, "the intention of the parties, to be gathered from the whole instrument, must prevail." 11 R. Lord, Williston on Contracts § 30:2, p. 27 (4th ed. 2012) (Williston). To determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific "customs, practices, usages, and terminology." *Id.*, § 30:4, at 55-58. When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further. *Id.*, § 30:6, at 98-104. But when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. *Id.*, § 30:7, at 116-124.

135 S. Ct. at 937-38 (Ginsburg, J., concurring); *see also Brooklyn Life Ins. Co of New York v. Dutcher*, 95 U.S. 269, 273 (1877) ("There is no surer way to find out what parties meant than to see what they have done.").

Contrary to CNH's contention in its summary judgment motion, the absence of clear and express

language vesting Plaintiffs' health insurance benefits in the relevant agreements does not necessarily compel the conclusion that the parties lacked the intent for those benefits to vest. Imposing such a requirement on collective bargaining agreements in general, or ERISA welfare benefits in particular, strays from the ordinary contract principles that *Tackett* instructs courts to apply in construing those agreement. As the Supreme Court has previously stated, duties in a contract may arise from its express or *implied* terms. *See Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 203 (1991).

CNH overstates the significance of the *Tackett* Court's single reference to *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). The Court refers to the standard applied in *Sprague* only to "underscore[] *Yard-Man*'s deviation from ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937. It is important to remember, as well, that *Sprague* did not involve bargained-for benefits; instead, the benefits at issue in that case were specifically characterized as unilaterally offered benefits. *Sprague*, 133 F.3d at 393, 402-03. Perhaps more importantly, if the *Tackett* Court intended to require clear and express vesting language to find the parties' intent to vest, why would it have not simply held that the Pension, Insurance, and Service Award Agreement at issue in the case before it- which lacked such express language- did not confer vested benefits? Instead, the Supreme Court remanded the case to the court of appeals. *Tackett*, 135 S. Ct. at 937.

This Court indicated in its September 28, 2015 decision that it "did not find a manifestation of intent to confer lifetime benefits in this case." *Reese*, 2015 WL

5679827, at *10. After tossing aside the *Yard-Man* inferences employed earlier by this Court and the Sixth Circuit in this case and in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd* 435 F.3d 571 (6th Cir. 2006), this Court then concluded "that its prior determination that the parties intended to confer lifetime healthcare benefits is no longer viable in light of the Supreme Court's intervening decision in *Tackett*." *Reese*, 2015 WL 5679827, at *10. The Court committed a palpable error by being too haste in reaching this conclusion. For the lack of a clear manifestation of the parties' intent in the collective bargaining agreement did not negate the possibility that there was ambiguity regarding their intent. Yet, the Court neglected to consider this possibility.[1] And as Plaintiffs argue in their motion for reconsideration, if the contract is ambiguous, the Court should have considered the "substantial extrinsic evidence . . . demonstrat[ing] that the UAW and Case intended to provide retirees and surviving spouses fully funded, lifetime health insurance benefits."[2] (ECF No.

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[1] *Tackett* does advise "that courts should not construe ambiguous writings to create lifetime promises." 135 S. Ct. at 936 (citation omitted). This Court erred in taking this direction to the opposite extreme: construing an ambiguous writing to create no lifetime promise. As long-standing principles of contract interpretation instruct, where a contract is ambiguous, extrinsic evidence may resolve that ambiguity.

[2] CNH's motion for summary judgment on the issue of vesting did not go further than arguing that once the inferences established in *Yard-Man* and its progeny are set aside, the Court must conclude that the parties did not intend Plaintiffs' health insurance benefits to vest. Because, in fact, the Court's inquiry should not end there, the Court could find that CNH has not established its entitlement

447, quoting *Yolton*, 318 F. Supp. 2d at 468); *see also Yolton*, 435 F.3d at 583. There are several reasons why this Court now finds an ambiguity in the relevant agreements.

As an initial matter, the Court erred in reading *Tackett* as "suggest[ing] that courts should not rely on language tying eligibility for contribution-free healthcare benefits to the receipt of pension benefits." *See Reese*, 2015 WL 5679827, at *9. All that *Tackett* holds or suggests is that a court may not *infer* from such tying language that the parties intended retiree health insurance benefits to vest. Such language does not lose all significance, however. In other words, *Tackett* does not hold that courts must ignore language that under *Yard-Man* and its progeny inferred an intent to vest. To the contrary, *Tackett* advises courts to apply "ordinary principles of contract law[,]" 135 S. Ct. at 933; and under those principles, " 'the intention of the parties' " is "gathered from the *whole instrument* . . .." *Id.* at 937 (Ginsburg, J., concurring) (emphasis added).

When the relevant agreements were negotiated, the parties were aware that pension benefits vest for the life of the retiree. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983) (citing 29 U.S.C. §§ 1051-1086) (explaining that ERISA "imposes participation, funding, and vesting requirements on pension plans). By tying eligibility for retiree health insurance benefits to eligibility for pension benefits, the parties may have

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to summary judgment based on its argument that *Tackett* requires a reversal of the prior conclusion that Plaintiffs are entitled to vested retiree health insurance benefits.

been expressing their intent for health insurance benefits to survive for the same duration. In other words, so long as an individual is eligible to receive a pension benefit, he or she continues to be eligible for the retiree health insurance benefits promised in the agreements.

Similarly, the absence of contract language specifically setting forth the duration of retiree health insurance benefits does not dictate automatically that the agreement's general durational clause applies to those benefits. Without doubt, the *Tackett* Court criticized the Sixth Circuit's expansion of *Yard-Man* in *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008), where the Sixth Circuit concluded that " '[a]bsent specific durational language referring to retiree benefits themselves,' a general durational clause *says nothing* about the vesting of retiree benefits." *Tackett*, 135 S. Ct. at 934 (quoting *Noe*, 520 F.2d at 555) (emphasis added in *Tackett*). Nevertheless, the *Tackett* Court did not hold that in the absence of specific durational language a general durational clause *says everything* about the vesting of retiree benefits. If this had been the meaning of the Court's holding– where the contract at issue lacked a specific durational clause for retiree health insurance benefits– why remand the case to the Sixth Circuit with instructions to apply ordinary rules of contract law to determine whether the parties intended those benefits to survive the contract's expiration? *Tackett*, 135 S. Ct. at 937.

It is true that generally " 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* (quoting *Litton*, 501 U.S. at 207). It is equally true, however, that the

expiration of a contract does not release the parties from obligations that are fixed under the contract, but have not been satisfied. *Litton*, 501 U.S. at 206 (explaining that "an expired contract has by its own terms released all its parties from their respective contractual obligations, *except* obligations already fixed under the contract but as yet unsatisfied.") (emphasis added).

Whether the parties intended certain obligations to survive the agreement's expiration is, again, determined by looking at the contract as a whole. Notably, here, the 1998 Central Agreement states that the group insurance plan *and the pension plan* "run concurrently with this Agreement . . .." (ECF No. 439-4 at Pg ID 16755.) Yet no one contends that the company's obligation to provide pension benefits ceased upon the expiration of the agreement. Further, under the heading "Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension", the 1998 Group Insurance Plan provides:

> Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs. *All other coverages cease coincident with the date of employment termination due to retirements* . . ..

(ECF No. 439-3 at Pg ID 16688, emphasis added.) Among the benefits "described in the following paragraphs" are group health insurance benefits for

retirees, for which "[n]o contributions are required[.]" (*Id.* at Pg ID 16688-16690.) At the very least, these provisions create an ambiguity with respect to the parties' intent. The inclusion of specific durational clauses for other benefits but not pension plan and retiree health insurance benefits further raises an ambiguity with respect to the parties' intent as to the duration of the latter benefit.

Other agreements between the parties further support a finding that the parties intended retiree health insurance benefits to vest. For example, in the Group Benefit Plan made effective with the 2005 negotiations between the parties and developed through the 2005 Central Agreement, retirees and surviving spouses of retirees *who retired on or after December 1, 2004*, were required to contribute towards their medical plans per a contribution schedule. (*See* ECF No. 125-18 at Pg ID 4530, 4557.) If the parties did not intend for retiree health care benefits to vest in the agreements preceding the 2005 agreement (i.e., if they intended for coverage to expire with the prior agreements), why limit contributions to post-December 1, 2004 retirees? The agreements this Court has referred to as "the 1993 Cap Letter", "the 1995 Cap Letter", and "the 1998 Letter of Understanding" offer further proof. (*See* ECF No. 125-6 at Pg ID 4438; ECF No. 125-8 at Pg ID 4650; ECF No. 125-11 at Pg ID 4306.) As this Court has previously found, these agreements reflect the parties' intent to vest retiree health care benefits which were provided in the 1998 collective bargaining agreement and preceding agreements. *See Reese v. CNH Global N.V.*, No. 04-70592, 2007 WL 2484989, at *7-9 (E.D. Mich. Aug. 29, 2007).

In short, as a result of the Supreme Court's decision in *Tackett*, courts may no longer rely on the inferences set forth in *Yard-Man* and its progeny when evaluating collective bargaining agreement to discern the intent of the parties with respect to the vesting of retiree health insurance benefits. This Court and the Sixth Circuit in fact relied on many– although not all– of those inferences when evaluating the agreements relevant to this case. Once those inferences are removed, however, *Tackett* instructs that courts still must employ "ordinary principles of contract law" to assess the parties' intentions-- which "control." *Tackett*, 135 S. Ct. at 933 (quotation marks and citation omitted). This Court committed a palpable error in its September 28, 2015 decision when it cast aside the now outlawed inferences from its previous analysis, but then failed to re-evaluate the relevant agreement according to those ordinary principles of contract law. Having done so now, the Court finds at least an ambiguity with respect to whether the parties intended Plaintiffs' health insurance benefits to vest. Accordingly, the Court may look to extrinsic evidence to ascertain their intent. As this Court has previously discussed and held, the extrinsic evidence supports a finding that the parties intended to grant Plaintiffs vested, lifetime retiree health insurance coverage. Therefore, the Court is granting Plaintiffs' motion for reconsideration and vacating its September 28, 2015 Judgment in favor of CNH.

Having reached this conclusion, the Court now must address the issue for which the Sixth Circuit remanded the matter: a determination of whether CNH may make the changes it proposes to those vested benefits.

See Reese v. CNH Am. LLC, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*").

II. Cross-Motions for Summary Judgment on the Issue of Reasonableness

Following *Reese II*, CNH submitted a new plan proposing changes to Plaintiffs' health insurance benefits and the parties engaged in discovery relating to the factors the Sixth Circuit instructed this Court to consider on remand in assessing the plan's reasonableness. In April 2014, after the conclusion of discovery, the parties filed cross-motions for summary judgment with respect to the reasonableness of CNH's proposed plan. (ECF Nos. 419, 423.) In addition, Plaintiffs filed a motion to strike the declarations of defense experts John F. Stahl and Scott J. Macey. (ECF No. 428.)

The *Reese II* panel instructed this Court as follows regarding its task on remand– a task that the panel described as a "vexing one," *Reese II*, 694 F.3d at 686:

> To gauge whether CNH has proposed reasonable modifications to its healthcare benefits for retirees, the district court should consider whether the new plan provides benefits "reasonably commensurate" with the old plan, whether the changes are "reasonable in light of changes in health care" (including access to new medical procedures and prescriptions) and whether the benefits are "roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326. In doing so, the district court should take evidence on the

following questions (and others it considers relevant to the reasonableness question):

- [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?
- [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
- [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
- [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
- [5] What difference (if any) is there between the quality of care available under the old and new plans?
- [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
- [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. at 685-86. The first five considerations focus on whether CNH's proposed plan to change Plaintiffs' retiree health insurance benefits is "reasonably commensurate" with the current plan. The sixth consideration focuses on whether the benefits provided under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees." Finally, the seventh consideration focuses on whether the proposed changes are 'reasonable in light of changes in health care." The Court addresses these issues in turn.[3]

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[3] Before proceeding, the Court addresses Plaintiffs' motion to strike the declarations of defense experts John F. Stahl and Scott J. Macey. Plaintiffs argue that the declarations should be stricken because: (1) they exceed the scope of previously-submitted declarations; (2) they exceed the scope of, and are inconsistent with, Stahl's and Macey's deposition testimony; (3) statements made by Stahl and Macey in their declarations are not based on personal knowledge; and (4) the declarations otherwise do not meet the requirements of the Federal Rules of Evidence. CNH opposes each argument and urges the Court to deny Plaintiffs' motion. Because the Court ultimately is granting summary judgment in favor of Plaintiffs and against CNH, the Court construes the facts throughout this Opinion in the light most favorable to CNH. In doing so, the Court considers the declarations (with one exception specifically noted). As the declarations do not change the result, the Court is denying Plaintiffs' motion to strike as moot.

A. Is the Proposed Plan "Reasonably Commensurate" with the Current Plan?

1. Analysis[4]

In considering whether CNH's proposed plan is "reasonably commensurate" with the current one, the Court is cognizant of the definition of "commensurate." One dictionary defines the word as "equal in measure or extent" and "corresponding in size, extent, amount, or degree." Webster's Ninth New Collegiate Dictionary 264 (1991). Synonyms for "commensurate" are:

> Proportionate (she was not paid commensurate with her experience and ability). Corresponding, compatible, in accord, fitting, on a proper scale, commensurable, parallel, appropriate, equivalent, in keeping with, relative, analogous, synchronous, coordinate, coterminous, adequate, equal, on a scale suitable, coextensive, balanced, symmetrical, congruous, matching, in agreement, comparable, consistent, due.

William Statsky, West's Legal Thesaurus Dictionary: Special Deluxe Ed. 151 (1986).

Considerations [1] and [4], above, require the Court to compare the average total out-of-pocket costs to retirees under both plans, now and in the future. The average annual out-of-pocket cost to pre-Medicare participants under the current plan is $269 in 2015,

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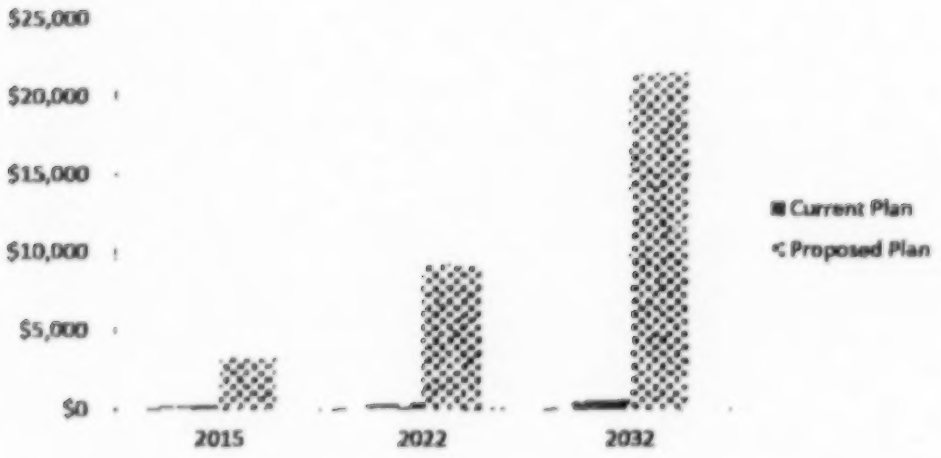
[4] All of the data discussed in this section of the Opinion is supplied by CNH's expert, John F. Stahl, a senior consulting actuary at Towers Watson. In construing the facts in the light most favorable to CNH, the Court assumes the accuracy of the data Stahl provides.

$377 in 2022, and $596 in 2032.[5] The average annual out-of-pocket cost to pre-Medicare participants under the proposed plan (including annual premium contributions) is estimated at $3,286 in 2015, $9,345 in 2022, and $21,615 in 2032. Under the current plan, pre-Medicare participants would pay less than 1.5% of the plan costs, with CNH paying over 98.5% of the plan costs, every year from now until at least 2032. Under the proposed plan, pre-Medicare participants would pay 19.2% of the costs of the plan in 2015, with CNH paying 80.8%. In 2022, pre-Medicare participants would pay 34.9% of the plan costs, with CNH paying 65.1%; and in 2032, pre-Medicare participants would pay 46.8% of the costs of the plan, with CNH paying 53.2%. The following chart and graph illustrate the data discussed in this paragraph:

Comparison of Out-of-Pocket Costs to Pre-Medicare Participants Under Current and Proposed Plans

	Current Plan		Proposed Plan	
	Average Annual Out-of-Pocket Cost of Retiree	Share of Costs Paid by Retiree	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree
2015	$269	1.5%	$3,286	19.2%
2022	$377	1.5%	$9,345	34.9%
2032	$596	1.5%	$21,615	46.8%

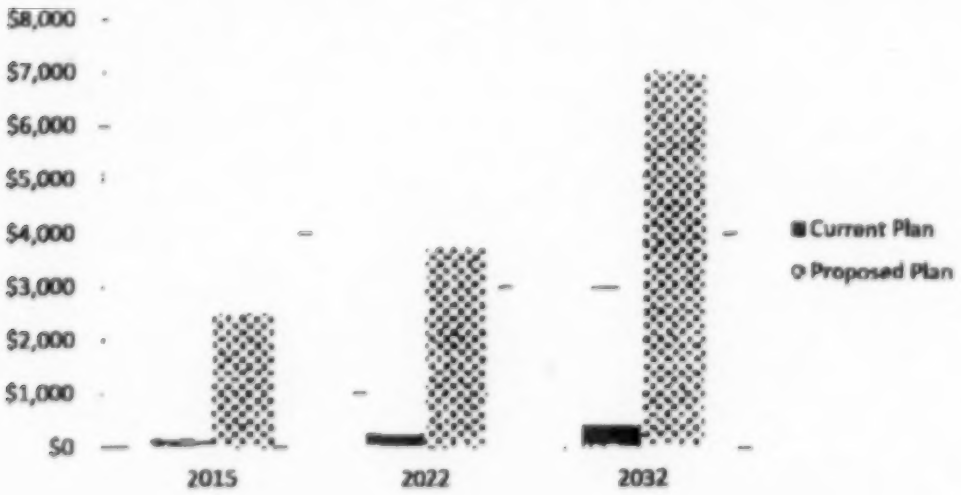
[5] Retirees make no premium contributions under the current plan.



The average annual out-of-pocket cost to Medicare-eligible participants under the current plan is $159 in 2015, $239 in 2022, and $417 in 2032. The average annual out-of-pocket cost to Medicare-eligible participants under the proposed plan (including annual premium contributions) is estimated at $2,512 in 2015, $3,735 in 2022, and $7,017 in 2032. Under the current plan, Medicare-eligible participants would pay less than 3% of the plan costs, with CNH paying over 97% of the plan costs, every year from now until at least 2032. Under the proposed plan, Medicare-eligible participants would pay 64.5% of the costs of the plan in 2015, with CNH paying 35.5%. In 2022, Medicare-eligible participants would pay 69% of the plan costs, with CNH paying 31%; and in 2032, Medicare-eligible participants would pay 74.9% of the costs of the plan, with CNH paying only 25.1%. The following chart and graph illustrate the data discussed in this paragraph:

Comparison of Out-of-Pocket Costs to Medicare-Eligible Participants Under Current and Proposed Plans

	Current Plan		Proposed Plan	
	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree	Average Annual Out-of-Pocket Cost to Retiree	Share of Costs Paid by Retiree
2015	$159	2.7%	$2,512	64.5%
2022	$239	2.7%	$3,735	69%
2032	$417	2.6%	$7,017	74.9%

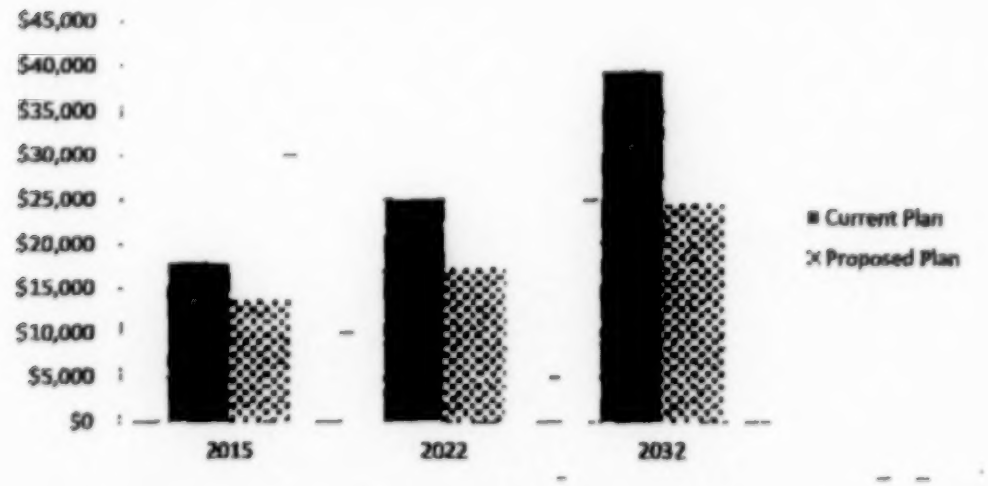


Considerations [2] and [4], above, require the Court to compare the average per-beneficiary cost to CNH under the current and proposed plans, now and in the future. CNH's costs under the current plan for each pre-Medicare participant are projected to be $17,935 in 2015, $25,148 in 2022, and $39,749 in 2032. Under the

proposed plan, CNH's costs for each pre-Medicare participant are projected to drop to $13,871 in 2015, $17,407 in 2022, and $24,570 in 2032. This data is illustrated in the following chart and graph:

Average Annual Costs to CNH of Each Pre-Medicare Participant

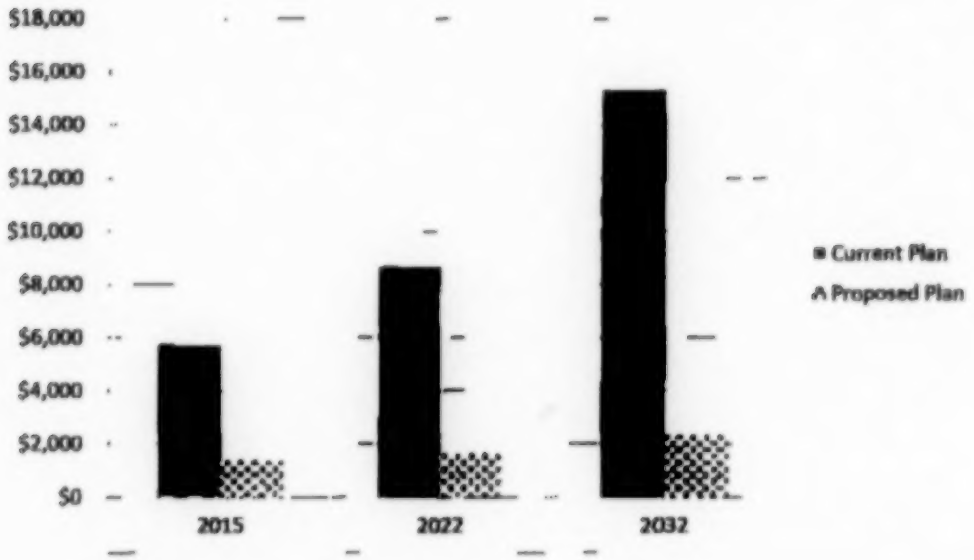
	Current Plan	Proposed Plan	Savings Per Participant
2015	$17,935	$13,871	$4,064
2022	$25,148	$17,407	$7,741
2032	$39,749	$24,570	$15,179



CNH's costs under the current plan for each Medicare-eligible participant are estimated to be $5,752 in 2015, $8,701 in 2022, and $15,322 in 2032. Under the proposed plan, CNH's costs for each Medicare-eligible participant drop dramatically to $1,380 in 2015, $1,681 in 2022, and $2,352 in 2032. This data is illustrated in the following chart and graph:

Average Annual Costs to CNH of Each Medicare-Eligible Participant

	Current Plan	Proposed Plan	Savings Per Participant
2015	$5,752	$1,380	$4,372
2022	$8,701	$1,681	$7,020
2032	$15,322	$2,352	$12,970



Consideration [3], above, requires the Court to compare the premiums, deductibles, and copayments that participants must pay under the current and proposed plans. The Court addresses the related concepts of coinsurance and out-of-pocket maxima, as well.

Premiums. Retirees make no premium payments under the current plan. The proposed plan imposes premium sharing under which participant premium payments grow each year. According to CNH's data, the proposed plan calls for premium contributions in

2015 of $1,410 per year for pre-Medicare retirees and $120 per year for Medicare-eligible retirees, compared to no premiums under the current plan. In subsequent years, premium contributions under the proposed plan increase by 60% of the total cost increase of retiree medical coverage from one year to the next. According to CNH's data, annual premium contributions for pre-Medicare participants will be $6,714 in 2022 (compared to $0 under the current plan) and $17,458 in 2032 (again, compared to $0 under the current plan). For Medicare-eligible participants, premium contributions will be $572 in 2022 (compared to $0 under the current plan) and $1,578 in 2032 (again, compared to $0 under the current plan). The following chart illustrates this data:

Annual Premium Requirements Under the Current and Proposed Plans

	Current Plan		Proposed Plan	
	Pre-Medicare Retirees	Medicare-Eligible Retirees	Pre-Medicare Retirees	Medicare-Eligible Retirees
2015	$0	$0	$1,410	$120
2022	$0	$0	$6,714	$572
2032	$0	$0	$17,458	$1,578

Deductibles, Copayments, Coinsurance, and Out-of-Pocket Maxima.

Under the current plan, there are no deductibles for in-network services, and either no copayment or a $5 copayment for almost all services, after which 100% of the cost of the service is covered. For out-of-network services under the current plan, there is a $100 per

person, $300 per family deductible, after which insurance pays for 80% of the reasonable and customary charges for almost all services. The out-of-pocket maximum for out-of-network services is $1,000 per person and $2,000 per family.

Under the proposed plan, pre-Medicare participants would pay a $200 per person, $400 per family deductible for in-network services, after which insurance would pay 85% of the reasonable and customary charges for most services, except there is no coinsurance and a $20 copayment for routine office visits and preventive care (allergy treatments, chiropractic, gynecologic exams, mammograms, primary care, mental health treatment, etc.). There is a $1,000 per person, $2,000 per family out-of-pocket maximum; copayments and deductibles do not count toward meeting the out-of-pocket maximum.

For out-of-network services for pre-Medicare participants under the proposed plan, there is a $500 per person, $1,000 per family deducible, after which insurance would pay 65% of the reasonable and customary charges for almost all services, including routine office visits and preventive care. There is a $2,000 per person out-of-pocket maximum.

Medicare-eligible participants under the proposed plan would pay a $250 per person, $500 per family deducible, after which insurance would pay for 80% of the reasonable and customary charges for almost all services, including most routine office visits (routine physicals are not covered). There is a $1,500 per person, $3,000 per family out-of-pocket maximum; deductibles count toward meeting the out-of-pocket maximum.

The following chart compares the deductibles, copayments, coinsurance, and out-of-pocket maxima under the current and proposed plans.

Material Terms of Healthcare Coverage Under Current and Proposed Plans

	Current Plan – All Retirees	**Proposed Plan – Pre-Medicare Retirees**	**Proposed Plan – Medicare-Eligible Retirees**
Annual Deductibles	*In-network*: $0 *Out-of-network*: $100 individual and $300 family	*In-network*: $200 individual and $400 family *Out-of-network*: $500 individual and $1,000 family	$250 individual and $500 family
Post-Deductible Coverage (Coinsurance)	*In-network*: 100% *Out-of-network*: 80%	*In-network*: 85% *Out-of-network*: 65%	80%
Copayments	$5	$20 (office visits)	None
Annual Out-of-Pocket Maxima	*In-network*: N/A *Out-of-network*:	*In-network*: $1,000 individual and	$1,500 individual and $3,000 family

	$1,000 individual and $2,000 family	$2,000 family *Out-of-network*: $2,000 individual	

Prescription Drug Coverage. Regarding prescription drug coverage, under the current plan, there is a $5 co-pay for a short-term (30 days or less) supply of generic or brand drugs, and no co-pay for a 90-day supply through the mail. Under the proposed plan, prescription drug coverage is entirely eliminated for Medicare-eligible participants. Pre-Medicare participants under the proposed plan would pay a $10, $40, and $60 co-pay for a short-term supply (30 days or less) of generic, formulary, and non-formulary drugs, respectively, and a $20, $80, and $120 co-pay for a long-term supply (30-90 days) of generic, formulary, and non-formulary drugs, respectively. Prescription co-pays do not count toward meeting the plan deductible or out-of pocket maximum. The following chart illustrates this data.

Prescription Drug Coverage Under Current and Proposed Plans

Current Plan – All Retirees	Proposed Plan – Pre-Medicare Retirees	Proposed Plan – Medicare-Eligible Retirees
Generic and Branded: $5 short term	Generic: $10 short term $20 long	No Coverage

$0 long term	Branded	term (formulary): $40 short term $80 long	
	Branded	term (non-formulary): $60 short term $120 long term	

According to the data supplied by CNH's expert, pre-Medicare participants under the proposed plan will pay average annual out-of-pocket costs for prescription medicine of $1,118 in 2015 (compared to $149 under the current plan), $1,568 in 2022 (compared to $209 under the current plan), and $2,478 in 2032 (compared to $331 under the current plan). Medicare-eligible participants will have to look to other sources for prescription coverage, namely, the Medicare Prescription Drug Plan (Part D), and are estimated to pay $2,102 in 2015 (compared to $124 under the current plan), $2,728 in 2022 (compared to $186 under the current plan), and $4,681 in 2032 (compared to $324 under the current plan).

Consideration [5], above, requires the Court to compare the quality of care available under the current and proposed plans. The parties agree that the quality of care is comparable under both plans, except that the quality of care for Medicare-eligible participants is reduced under the proposed plan due to the unavailability of prescription drug coverage for that

class of participants through the plan. Aside from this, the parties agree that both plans cover services that are "medically necessary" for the care of the participant and offer the same suite of benefits.[6]

2. Summary

The Court's analysis of the first five considerations above, all of which bear on whether the proposed plan is "reasonably commensurate" to the current plan, reveals that the plan proposed by CNH bears little resemblance to the current plan from a cost-sharing perspective. In sum, Plaintiffs are far worse off under the proposed plan and the cost-shift proposed by CNH is extreme. In 2015, out-of-pocket costs under the proposed plan are expected to be more than twelve times higher for pre-Medicare retirees than they would be for the same year under the current plan and almost sixteen times higher for Medicare-eligible retirees. By 2032, the numbers become even more staggering. Pre-Medicare retirees are expected to pay out-of-pocket costs under the proposed plan that are more than thirty-six times those which they would be paying in 2032 under the current plan, and Medicare-eligible retirees are expected to pay costs that are almost

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[6] Plaintiffs argue that the quality of care under the proposed plan will deteriorate with each passing year as participant cost of coverage increases, because Plaintiffs will forego medical treatment as it becomes increasingly unaffordable. However, consideration [5] of the *Reese* framework requires the Court to compare the quality of care "available" under both plans. The affordability of those services (i.e., their *practical* availability) is the subject of considerations [1] through [4], discussed above.

seventeen times higher than those they would be paying under the current plan.[7]

In allowing "reasonable" modifications to Plaintiffs' vested healthcare benefits, this Court does not believe the Sixth Circuit had in mind anything near the magnitude of the changes proposed here. "Reasonably commensurate" changes must mean, at a minimum, changes that are not drastic. Because the cost changes proposed here are drastic, the Court does not believe that such changes can even arguably qualify as "reasonably commensurate."

Therefore, the Court concludes that the proposed plan is far from "reasonably commensurate"– or "equal in measure or extent"– to the current plan. Because the issue is not a close one, as CNH has opted to propose a plan that drastically increases retiree costs with no meaningful mitigating benefit, the Court does not believe that this case requires it expand the meaning of "reasonably commensurate," as the parties urge, beyond the dictionary definitions articulated above.

Before proceeding to the next element of the *Reese* framework, the Court notes that CNH's reliance on *Tackett v. M&G Polymers USA, LLC*, 733 F.3d 589 (6th

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[7] The Court is cognizant that the number of pre-Medicare retirees will decrease over time, and that there are expected to be only a handful of retirees remaining in the Class by 2032. However, there is no dispute that there will still be some pre-Medicare retirees in 2032 – thirteen by the parties' estimate. The Court does not ignore these unlucky thirteen retirees in its reasonableness analysis. In 2032, these thirteen retirees are expected to pay shockingly high average annual out-of-pockets costs of $21,615 – $1,801.25 per month – for their healthcare under the Proposed Plan.

Cir. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 926 (2015), is misplaced. In that case, the Sixth Circuit held, with no analysis, that the district court did not clearly err in finding the following modifications to healthcare benefits reasonable under the standard set forth in *Reese*: An increase in the co-pay for generic drugs from $4 to $10, an increase in the annual prescription drug deductible from $175 to $250, and an increase in the out-of-pocket maximum from $500 to $4,000 per family. *Id.* at 601. This aspect of *Tackett*'s holding is not helpful to CNH because the changes proposed by CNH in the present case are, considered cumulatively, more extreme than the changes approved in *Tackett*. Moreover, CNH's reliance on the case overlooks both the deferential standard of review employed by the *Tackett* court and the court's failure to offer any meaningful analysis in support of its conclusory holding.

B. Are the Benefits Under the Proposed Plan "Roughly Consistent With the Kinds of Benefits Provided to Current Employees"?

1. Analysis

Pursuant to consideration [6] of the framework set forth in *Reese*, above, this Court must compare the benefits provided to current CNH retirees with the benefits that would be provided to Plaintiffs under the proposed plan, and determine whether the latter benefits are "roughly consistent with the kinds of benefits provided to current employees."

Current CNH retirees receive their benefits under a CBA which became effective in 2010. The 2010 CBA is materially identical to the parties' prior CBA, which

became effective in 2005. The parties seem to agree that the two plans – the proposed plan and the plan available to current CNH retirees– are roughly equivalent.[8] Because the two plans are roughly equivalent, CNH argues that this consideration of the *Reese* framework militates in favor of approving the proposed plan.

However, Plaintiffs argue that, although the plans themselves are similar, current CNH retirees are better off in terms of their overall healthcare situation than Plaintiffs would be under the proposed plan. Plaintiffs argue that current retirees obtained significant benefit improvements that were successfully bargained-for and awarded under the 2005 and 2010 CBAs– benefit improvements which were meant to offset the effect of the significant reduction in healthcare benefits to individuals retiring under those agreements, and which would not be available to Plaintiffs under the proposed plan. Plaintiffs discuss three mitigating benefits that are available to current retirees but would not be available to Plaintiffs under

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[8] CNH points out that the premiums Plaintiffs would pay under the proposed plan always will be less than the premiums paid under the 2005 and 2010 CBAs by current retirees, as the premiums paid by current retirees began increasing each year since 2005 under an escalating premium schedule (i.e., 60% of the total cost increase of retiree medical coverage from one year to the next) while the premiums that Plaintiffs would pay under the proposed plan would not begin increasing until the proposed plan takes effect. In other words, the premiums paid by current retirees had a "head start" on escalating and thus will always be higher than the premiums paid by Plaintiffs under the proposed plan, which would not begin escalating until the proposed plan becomes effective, if at all.

the proposed plan, arguing that the availability of these improvements to only current retirees and not to Plaintiffs makes the former group of retirees better off than the latter group in terms of their overall healthcare picture.

First, CNH agreed to a pension increase for post-2005 retirees. According to Plaintiffs, current retirees receive $6,000 per year in additional supplemental allowance pension payments until age sixty-two and retirees who have been employed for at least thirty years receive an annual increase in basic pension benefits of $1,746 per year starting at age sixty-two and continuing for life. CNH does not dispute this, although it points out that pension amounts are a function of pension rates and years of service and thus a current retiree who has less years of service may receive a smaller pension than a retiree in Plaintiffs' Class. Nevertheless, CNH does not dispute that pension rates are higher for current retirees than for Plaintiffs.

Second, CNH agreed to increase the monthly Medicare Part B reimbursement benefit by $34.50, from $65.50 per Medicare participant (the amount Plaintiffs now receive) to $100 (the amount current retirees receive). This benefit improvement provides current retirees with an additional $414 per year (or $818 for married couples) beginning at age sixty-five and continuing for life, in order to offset the loss of CNH-sponsored prescription drug coverage for Medicare-eligible retirees. CNH does not dispute this improvement.

Third, CNH agreed to establish and contribute to Retiree Medical Savings Accounts (RMSA). According

to Plaintiffs, CNH contributed a median amount of more than $16,000 for each retiree who retired after May 1, 2005 for a period of six years (i.e., during the term of the 2005 CBA). CNH does not dispute this, but states that it is not obligated to make any future contributions to retiree RMSAs going forward. Plaintiffs do not appear to disagree.

CNH asks the Court to ignore the three improved benefits awarded to current retirees as irrelevant to the analysis required under *Reese* because *Reese* requires a comparison of only the plans, and the improved benefits are not part of the plan. The Court rejects this rigid reading of *Reese*. When directing this Court to compare the healthcare plan offered to current retirees with the proposed healthcare plan, the *Reese* panels may not have contemplated that benefits impacting retiree healthcare affordability could be awarded outside the four corners of the healthcare plans themselves. To consider only the two plans while ignoring other benefits impacting retiree healthcare affordability would result in a distortion of the full retiree healthcare picture.

Plaintiffs argue that the above three benefit improvements, which are available to current retirees but would not be available to Plaintiffs under the proposed plan, place current retirees in a better position than Plaintiffs would be under the proposed plan. However, the exact extent to which current retirees are better off by virtue of the three improvements depends on factors unique to each retiree (years of service, lifespan, etc.) and is difficult to quantify. For example, the three benefit improvements discussed above could have a value of $135,000 over the

lifetime of a current retiree with over thirty years of service who lives until the age of eighty-two. If the employee retired at age fifty, he or she would receive twelve years of supplemental allowance pension payments in the annual amount of $6,000 per year (for a total of $72,000 over twelve years), twenty years of basic pension benefits in the annual amount of $1,746 (for a total of $34,920 over twenty years), seventeen years of increased Medicare Part B reimbursements (for a total of $7,038 over seventeen years), and $16,000 in contributions to an RMSA account. The value of the three benefit improvements would be altogether different for a retiree with a different number of years of service and a different lifespan.

Another complicating factor is that, while current retirees enjoy some degree of benefit improvements that would be not offered to Plaintiffs under the proposed plan, thereby making current retirees better off than Plaintiffs would be under the proposed plan, the extent to which current retirees are better off (which is already unknown, as it depends on the unique circumstances of the retiree) is reduced by virtue of the fact that current retirees pay more for their benefits, through more expensive premiums, than would Plaintiffs under the proposed plan.

2. Summary

As mentioned, this Court's task is to compare the benefits provided to current CNH retirees with the benefits that would be provided to Plaintiffs under the proposed plan, and to determine whether the benefits that would be provided to Plaintiffs under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees." While there is little

difference between the two healthcare plans, the Court cannot ignore the fact that current retirees were awarded improved benefits outside the context of their healthcare plan– benefits that render current retirees better off than Plaintiffs would be under the proposed plan. At the same time, although current retirees are entitled to benefits that are better than those that would be awarded to Plaintiffs, current retirees also pay more for their benefits because their premiums are higher, and will always be higher, than those Plaintiffs would pay under the proposed plan.

The record does not reflect, beyond the next few years, how much less Plaintiffs would pay in premiums under the proposed plan, compared to how much current retirees pay in premiums under the 2005 and 2010 CBAs. Therefore, it is not possible to put a dollar amount on how much Plaintiffs would save in premiums and compare that amount to the value of the improved benefits awarded to current retirees, in order to determine who comes out "on top"– current retirees, who would pay more in premiums but have better overall benefits, or Plaintiffs, who would pay less in premiums but have worse overall benefits.

Assuming that the lifetime value of the improved benefits enjoyed by current retirees is in the same ballpark as the lifetime premium savings that would be enjoyed by Plaintiffs under the proposed plan, and because the healthcare plan offered to current retirees is similar to the proposed plan, the benefits available to Plaintiffs under the proposed plan are "roughly consistent with the kinds of benefits provided to current employees."

C. Are the Proposed Changes "Reasonable in Light of Changes to Health Care"?

1. Analysis

In determining whether the changes proposed by CNH are "reasonable in light of changes to health care," the Court is obligated to consider how the proposed plan compares to plans "available to retirees and workers at companies similar to CNH and with demographically similar employees."[9] Predictably, Plaintiffs argue that the proposed changes are not reasonable in light of changes to healthcare, while CNH takes the opposite position. Also unsurprisingly, both sides have selected comparator plans that support their respective positions. That is, Plaintiffs have selected a comparator plan– one offered by one of CNH's principal competitors, John Deere– which is very similar to the current plan and much less favorable to retirees than the proposed plan. The plan selected by Plaintiffs has no premiums, full coverage for in-network services, higher rates of coinsurance and lower deductibles for out-of-network services, and low copayments for office visits and prescription drugs. CNH has selected several comparator plans– one of which is a plan offered by another of CNH's principal

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[9] Plaintiffs strenuously object to this inquiry, insisting that plans offered by other companies are irrelevant in assessing the reasonableness of the modifications proposed here: "It would be difficult to more completely divorce the reasonableness inquiry from the context of the intent of the parties during collective bargaining, than to introduce the 'other similar companies' comparison as an element of 'reasonableness.'" (ECF No. 419 at Pg ID 14067). The Court agrees with Plaintiffs, but the Sixth Circuit's instructions are clear.

competitors, Caterpillar– which are similar to, or more favorable to, retirees than the proposed plan. The Caterpillar plan features participant premium contribution requirements, higher deductibles and copayments, and lower rates of coinsurance.

CNH does not dispute that the comparator plan selected by Plaintiffs, the John Deere plan, is similar to the current plan.[10] CNH also does not dispute that John Deere is a company that is similar to CNH, with demographically similar employees. Therefore, the Court deems the John Deere plan an appropriate comparator and concludes that the plan supports Plaintiffs' position that the current plan remains reasonable in light of changes to healthcare.

Apparently conceding that the John Deere plan supports Plaintiffs' position, CNH argues that "*Reese* does not require CNH's proposed plan to match the one plan most favorable to retirees" and that the comparator plan on which they principally rely, the Caterpillar plan, "is consistent with the trend in the marketplace toward greater participant cost-sharing." (ECF No. 426 at Pg ID 15530). The problem with CNH's argument is that if *Reese* does not require that the proposed plan match a comparator plan that is *favorable* to retirees, it also cannot require that the

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[10] In his declaration, defense expert Scott Macey makes certain representations about the John Deere plan – representations that Plaintiffs believe make the plan look less favorable to retirees than it is, and representations that Plaintiffs argue are factually incorrect. However, in the pertinent section of their brief opposing Plaintiffs' motion for summary judgment, CNH does not cite Macey's representations about the John Deere plan and do not argue that the John Deere plan is dissimilar to the current plan.

proposed plan match comparator plans, such as the ones selected by CNH, that are *unfavorable* to retirees. Herein lies a problem with consideration [7] of the *Reese* framework requiring a comparison of the proposed plan with plans offered by "companies similar to CNH and with demographically similar employees": There are all kinds of healthcare plans offered by employers– plans like the current plan that are favorable to retirees, and plans like the proposed plan that are not favorable to retirees. Naturally, the proposed plan will compare favorably to some plans and not to others, and the parties will surely locate the plans that support their respective litigation-induced positions and select those plans as comparators. For this reason, comparing the proposed plan to other plans that have been cherry-picked by the parties sheds little or no light on changes in the provision of employer-sponsored healthcare benefits.

As mentioned, CNH relies on a healthcare plan offered by Caterpillar as its principal comparator. Plaintiffs do not dispute that Caterpillar is a company that is "similar to CNH and with demographically similar employees" and that the Caterpillar plan is less favorable to retirees than the proposed plan. However, Plaintiffs argue that the Caterpillar plan is not an appropriate comparator because the unfavorable benefit levels conferred in the Caterpillar plan stem, not from trends in the area of employer healthcare plans, but rather from the unique and contentious bargaining atmosphere and protracted negotiations between the union and Caterpillar.

Plaintiffs submit the declaration of James Atwood, an administrative assistant with UAW who

participated in the negotiations between the union and Caterpillar during the relevant time period. (ECF No. 425-2 at Pg ID 15007-08, ¶¶ 7-11). Atwood states that under the union's 1988 CBA with Caterpillar (and under prior CBAs), retirees received healthcare benefits with no premium contribution requirement. (*Id.* at Pg ID 15008, ¶ 12.) However, beginning in 1991 when the parties began negotiating a successor CBA, the negotiations broke down, employees began to strike, and a lengthy labor dispute ensued, at the beginning of which Caterpillar unilaterally imposed a "cap" on the costs that it would pay for retiree healthcare benefits. (*Id.* at Pg ID 15008-15009, ¶¶ 13-18.)[11] Throughout the labor dispute, which was a particularly litigious period in the relationship between UAW and Caterpillar, Caterpillar refused to eliminate the cap, prompting the union to take steps to address the impact of the cap on current and future Caterpillar retirees. (*Id.* at Pg ID 15009-15010, ¶¶ 19-23.)

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[11] CNH's expert, Scott Macey, suggests in his declaration that UAW and Caterpillar agreed to the cap. (*See* ECF No. 423-22 at Pg ID 14920-21, ¶ 53.) However, unlike Atwood, Macey did not personally participate in the negotiations between UAW and Caterpillar. Because declarations must be based on personal knowledge and nothing in Macey's declaration indicates that he has personal knowledge of what occurred during the negotiations between UAW and Caterpillar, the Court disregards that portion of Macey's declaration as unreliable. *See* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge . . ."); *Duke v. Nationstar Mortg., LLC*, 893 F. Supp. 2d 1238, 1244 (N.D. Ala. 2012) ("An affidavit or declaration based on anything less than personal knowledge is insufficient. . . . Additionally, the affidavit or declaration must state the basis for such personal knowledge.").

According to Atwood, in 2005, "the UAW was able to secure Caterpillar's agreement to vastly improve benefits for retirees and their dependents," including increased pension benefits, lump sum payments to existing retirees and surviving spouses, retirement bonuses, and increased Medicare Part B premium reimbursements– all benefits that were meant to offset an increase in retiree out-of-pocket healthcare costs. (*Id.* at Pg ID 15010-15013, ¶¶ 24-25, 28-29.)

In light of the turbulent and unique bargaining history between UAW and Caterpillar, Plaintiffs argue that the Caterpillar plan is not an appropriate comparator because the benefit levels offered under the plan are a function of the distinct bargaining factors and dynamics between Caterpillar and the union, and not healthcare plan trends among companies similar to CNH. Plaintiffs' argument highlights two additional problems with consideration [7] of the *Reese* framework calling for a comparison between the proposed plan and plans offered by similar companies. First, although the inquiry is whether the proposed modifications are "reasonable in light of changes to health care"– an inquiry that is meant to take into account the degree to which the proposed modifications are consistent with trends in the area of employer-sponsored healthcare benefits– the level of benefits awarded under a given plan may have less to do with the climate the inquiry is meant to consider than with other factors that do not reflect trends in healthcare. Stated differently, it is difficult to determine the extent to which the benefit levels in a plan reflect healthcare trends as opposed to other factors that are irrelevant to the task at hand.

Second, examining a healthcare plan in a vacuum may not paint an accurate and complete picture of how well-off retirees are in terms of their healthcare situation. This is because benefits awarded outside the context of the plan factor into the calculus, as well, and those other benefits, assuming the Court may permissibly consider them under the nebulous *Reese* framework, may escape detection. For example, a healthcare plan with high participant costs may not translate into overall high participant healthcare costs if the high costs called for under the plan are mitigated through other benefits awarded outside the plan. And the opposite also is true: A healthcare plan calling for low participant costs may not mean participant healthcare costs are low if less generous benefits are awarded outside the plan.

The Caterpillar plan on which CNH relies seems to implicate all of these concerns, calling into question whether the plan reflects the reality of the present-day healthcare market. Moreover, although the principal comparator plan on which CNH relies is the Caterpillar plan, they also discuss many other comparator plans, including plans offered by AT&T, Ford, General Motors, U.S. Steel, Goodyear, and the federal judiciary. According to CNH, these entities have implemented a cost-sharing approach similar to the approach taken in the proposed plan and the benefit levels under these plans are similar to, or less generous than, the benefit levels offered in the proposed plan. In addition, CNH cites a study in which Towers Watson, CNH's benefit consultant, compared the proposed plan with data aggregated in its database of nearly 900 employers. CNH states that the proposed plan is more favorable to retirees than the plans offered by at least 75% of the

nearly 900 employers surveyed from the perspective of the participants.

In their response brief, Plaintiffs vigorously attack the utility of CNH's information. Plaintiffs state that the comparator companies on which CNH relies are not companies that are "similar" to CNH and are thus not appropriate comparators. Plaintiffs also argue that the Towers Watson comparison is "devoid of meaning" for many reasons, including the following: (1) the study purposefully excludes unionized employers with collectively bargained plans, despite the availability of a database compiling information on such plans; (2) the study includes only plans that are provided to active employees and not plans that are provided to retirees; and (3) the database was not designed to find companies in the same industry as CNH. Plaintiffs are correct.

Reese instructed the parties and this Court to compare the proposed plan with plans offered at "companies similar to CNH and with demographically similar employees." Accordingly, the Court deems irrelevant plans offered by companies that are not shown to be "similar" to CNH with "demographically similar employees." CNH does not explain how entities like AT&T, Ford, General Motors, U.S. Steel, Goodyear, and the federal judiciary are similar to CNH with demographically similar employees. In addition, because the Towers Watson study analyzes plans offered by nearly 900 employers and there has been no showing that all 900 companies included in the study are "similar to CNH" and have "demographically similar employees," the study is irrelevant.

2. Summary

In sum, comparing the proposed plan to plans offered by "companies similar to CNH and with demographically similar employees" does not shed light on whether the modifications proposed by CNH are "reasonable in light of changes to health care." Among the many plans offered by employers, the parties have merely selected plans that match their respective litigation positions. Plaintiffs selected a plan that is similar to the current plan and CNH selected plans similar to the proposed plan. Even putting aside the cherry-picking concern, the full participant benefit picture cannot be gleaned from an examination of the healthcare plans alone, as benefits bearing on retiree healthcare costs are sometimes conferred outside the context of the healthcare plan. Moreover, the process by which employee benefits are negotiated is a give-and-take process under which the bargaining parties may agree to forego healthcare benefits in exchange for other types of benefits, or bolster healthcare benefits in exchange for benefit reductions in other areas. Given these practical bargaining realities, the level of healthcare benefits on which the bargaining parties finally settle provides little insight on healthcare trends.

D. Conclusion

The Court has considered whether the proposed plan provides benefits that are "reasonably commensurate" with the current plan, whether the benefits are "roughly consistent with the kinds of benefits provided to current employees," and whether the proposed changes are "reasonable in light of changes in health care." Regarding the first

consideration, the proposed plan imposes a massive cost-shift from CNH to the retirees and is far from "reasonably commensurate" with the current plan. If approval of CNH's plan modifications requires satisfaction of all three elements of the *Reese* reasonableness framework,[12] the Court rejects CNH's proposed changes based solely on CNH's failure to satisfy this first element.

However, even if this Court is wrong about the conjunctive nature of the reasonableness framework and the *Reese* panels envisioned a balancing approach whereby failure to satisfy one element should not necessarily result in the rejection of CNH's proposed modifications, the Court still rejects CNH's proposed modifications. The first element of *Reese*'s reasonableness framework weighs strongly in favor of rejecting the proposed changes, so much so that the Court believes a strong showing by CNH on the remaining elements of the *Reese* framework would be necessary to tilt the balance in favor of approving the proposed changes. CNH has failed to make such a showing.

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[12] *Reese* "construed [the 1998 CBA] to permit modifications to benefits plans that are 'reasonably commensurate' with the benefits provided in the 1998 CBA, 'reasonable in light of changes in health care' and roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326 (quoting *Zielinski*, 463 F.3d at 620); *see also Reese II*, 694 F.3d at 685. Based on the panel's use of conjunctive language to articulate the test, the Court believes that the proposed modifications, to be approved, must satisfy all three elements comprising the reasonableness framework and that failure to satisfy one of the elements requires rejection of CNH's proposed modifications.

With regard to the second element, whether the proposed benefits are "roughly consistent with the kinds of benefits provided to current employees," it is impossible to discern precisely how much better or worse Plaintiffs would be under the proposed plan, as compared to current retirees under the 2005 and 2010 CBAs. Nevertheless, it appears that the two classes of retirees are in roughly similar positions in terms of their healthcare situation. Because the evidence does not support a finding that one class is significantly better or worse than the other, this element of the *Reese* framework does not weigh strongly in favor of approving or rejecting the proposed modifications.

Regarding the third element of *Reese*'s reasonableness framework, whether the proposed changes are "reasonable in light of changes in health care," the relevant inquiry mandated by *Reese*– a comparison between the proposed plan and "plans available to retirees and workers at companies similar to CNH and with demographically similar employees"– is problematic as a practical matter for all the reasons explained above. This inquiry does not shed light on whether the proposed changes are "reasonable in light of changes in health care." In any event, putting aside the utility of this inquiry, CNH has not shown that the proposed modifications are consistent with plans offered by "companies similar to CNH and with demographically similar employees" any more than Plaintiffs have shown that the proposed modifications are inconsistent with plans offered by "companies similar to CNH and with demographically similar employees." This element does not weigh strongly in support of either side.

For these reasons, the Court concludes that the modifications proposed by CNH are not reasonable under *Reese*'s reasonableness framework and rejects the modifications. CNH argues that the Court should sever the proposed modifications it finds unreasonable and approve the remainder of the modifications. Conversely, Plaintiffs argue that the Court should consider the proposed plan as a whole and not approve or reject it in parts. Nothing in the *Reese* decisions informs the debate on this issue.

Even if CNH is correct that this Court has authority to consider each modification separately, approving the reasonable proposed changes and rejecting the unreasonable ones, CNH does not argue that the Court must do so, and the Court declines to adopt this approach. As Plaintiffs correctly point out, the piecemeal approach urged by CNH, if adopted, would encourage employers to request modifications that are unreasonable, knowing that they can rely on a court to separately examine each proposed modification and tweak it so that it falls just within the hazy category of "reasonable." It is not the role of a court to write or rewrite a healthcare plan, and incentivizing employers to suggest reasonable modifications while believing them to be unreasonable arguably encourages bad faith conduct. In addition, courts lack the expertise necessary to fashion the specifics of a healthcare plan. The Court does not believe *Reese* requires, or even contemplates, judicial scrutiny into such minute, yet important, plan details.

For all of the reasons stated above,ok

IT IS ORDERED that Plaintiffs' Motion for Reconsideration (ECF No. 447) is **GRANTED** and the

September 28, 2015 Judgment (ECF No. 446) is **VACATED**;

IT IS FURTHER ORDERED that CNH's Motion for Summary Judgment (ECF No. 423) is **DENIED**;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (ECF No. 419) is **GRANTED**;

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike (ECF No. 428) is **DENIED AS MOOT**.

Date: November 9, 2015

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 04-CV-70592
Honorable Patrick J. Duggan

[Filed September 28, 2015]

JACK REESE, et al.,

Plaintiffs,

vs.

CNH INDUSTRIAL N.V., et al.,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' LATER-FILED MOTION FOR SUMMARY JUDGMENT (ECF NO. 439) AND DENYING ALL OTHER PENDING MOTIONS AS MOOT (ECF NOS. 413, 423 & 428)

I. INTRODUCTION

This matter is before the Court on remand, for a second time, from the United States Court of Appeals for the Sixth Circuit. In August 2007, the Court granted summary judgment to Plaintiffs on their claim that they are entitled to irreducible retiree healthcare

benefits from Defendants that survive the expiration of the pertinent collective bargaining agreement ("CBA"), which expired in 2004. *See Reese v. CNH Global N.V.*, No. 04-CV-70592, 2007 WL 2484989 (E.D. Mich. Aug. 29, 2007). The Sixth Circuit affirmed the Court's holding that Plaintiffs are entitled to *some* healthcare benefits that survive the expiration of the CBA, holding that Defendants may not terminate *all* healthcare benefits for retirees, but determined that the scope of the benefits can be reasonably altered. The *Reese I* panel remanded the action to this Court to determine how and in what circumstances benefits may be altered. *See Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009) ("*Reese I*").

On remand, this Court again granted summary judgment to Plaintiffs, concluding that Defendants could not *unilaterally* change the level of retiree benefits. *See Reese v. CNH Global N.V.*, No. 04-CV-70592, 2011 WL 824585 (E.D. Mich. Mar. 3, 2011). Defendants once again appealed and the Sixth Circuit reversed, holding that Defendants can unilaterally reduce retiree benefits as long as the changes are reasonable. *See Reese v. CNH Am. LLC*, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*"). The Sixth Circuit remanded for a determination whether the changes proposed by Defendants satisfy the reasonableness criteria that the panel articulated in *Reese II*.

Back in this Court for the third time, the parties filed cross-motions for summary judgment addressing the reasonableness of Defendants' proposed changes (ECF Nos. 419 & 423). Plaintiffs argue that the proposed changes are unreasonable; Defendants argue the opposite. In addition, Plaintiffs filed a motion to

strike the declarations of two defense experts (ECF No. 428), which were submitted in support of Defendants' motion for summary judgment. The Court held oral argument on these motions on February 3, 2015.

Three weeks after oral argument, Defendants filed a second motion for summary judgment, arguing that Plaintiffs are not entitled to *any* healthcare benefits lasting beyond the expiration of the CBA in light of the United States Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), which was issued earlier this year during the pendency of these second remand proceedings. Defendants contend that the conclusion of this Court and the Sixth Circuit that Defendants may not terminate retiree healthcare benefits is no longer viable in light of *Tackett*.

Defendants' second summary judgment motion is fully briefed and the Court will dispense with oral argument. *See* E.D. Mich. LR 7.1(f)(2). For the reasons that follow, the Court agrees with Defendants that the previous determination that Plaintiffs are entitled to healthcare benefits lasting beyond the expiration of the CBA is no longer correct in light of *Tackett*. Constrained by the Supreme Court's decision, the Court has no choice but to grant Defendants' second summary judgment motion. Because Plaintiffs' retiree healthcare benefits do not survive the expiration of the CBA in light of *Tackett*, the Court does not consider whether Defendants' proposed changes to those benefits are reasonable, as that issue is now moot. Accordingly, the Court will deny as moot the parties' cross-motions for summary judgment and Plaintiffs' motion to strike.

II. BACKGROUND

A. Factual

The factual background of this case is well-known to the parties and the Court and is not repeated here. The reader is directed to the citations contained in the opening two paragraphs of this Opinion and Order for a detailed recitation of the facts.

B. Procedural

This case was filed in February 2004, almost twelve years ago. In August 2007, this Court granted summary judgment in favor of Plaintiffs, holding that they are entitled to irreducible lifetime healthcare benefits under the terms of the CBA in effect at the time of their retirement ("1998 CBA").[1]

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[1] The Court avoids the use of the word "vested" in this Opinion and Order because the precise meaning of that word is unclear in light of the Sixth Circuit's decisions in *Reese*. Prior to those decisions, "vested" benefits referred to benefits that last forever *at a fixed level*. *See, e.g.*, *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 92 S. Ct. 383, 398 n.20 (1971) ("Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed."); *Moore v. Menasha Corp.*, 690 F.3d 444, 450 (6th Cir. 2012) ("An employer that contractually obligates itself to provide vested healthcare benefits renders that promise 'forever unalterable.'"); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578 (6th Cir. 2006) ("If a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation."); *Int'l Union v. Loral Corp.*, 107 F.3d 11 (Table), 1997 WL 49077, at *2 (6th Cir. Feb. 3, 1997) (unpublished) ("The primary question . . . is whether the parties to

On appeal, a panel of the Sixth Circuit consisting of Judges Sutton, Gibbons, and Ryan affirmed this Court's holding that Plaintiffs are entitled to lifetime healthcare benefits under the 1998 CBA. However, the panel raised an issue that was not addressed by the parties, that being: "What does vesting mean" in the context of this case? *Reese I*, 574 F.3d at 321. The panel determined that, while the CBA is properly interpreted to prohibit the altogether elimination of retiree healthcare benefits, there is nothing in the CBA evincing a promise to forever maintain lifetime benefits at the same level. Because the panel found nothing in the CBA preventing Defendants from altering benefits, so long as they did not entirely eliminate them, it looked to other evidence to determine whether the parties intended the level of benefits to remain the same forever.[2]

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the relevant agreements intended the benefits to 'vest,' i.e., to remain at the same level for the lifetime of the beneficiary."). However, the *Reese* panels appear to have changed the definition of "vested" inasmuch as they use that word to describe benefits that, while lasting for life, are subject to unilateral reduction. *See Reese I*, 574 F.3d at 321-22, 324; *Reese II*, 694 F.3d at 683-84. Rather than use a word with an uncertain or imprecise meaning, the Court uses other words (e.g., "lifetime," "forever," "for life," "irreducible," "at the same level," etc.) to describe the duration and scope of retiree benefits.

[2] A panel of the Sixth Circuit previously rejected the notion that an employer may unilaterally reduce lifetime healthcare benefits unless there is an agreement allowing such unilateral action. *See Loral Corp.*, 1997 WL 49077, at *3 ("[I]f the employer retained discretion to cut [healthcare] benefits somewhat, there is nothing to give us a standard by which to distinguish a 1% cut from a 99% cut that would be virtually equivalent to a complete revocation. It might well be sensible for parties to agree to allow the employer to

Examining other evidence, the panel concluded that the parties did not view the promised benefits as forever unalterable. To reach that conclusion, the panel relied principally on one special fact or "historical feature" of this case. Specifically, the panel found that the 1998 CBA modified the healthcare benefits available to prior retirees who retired under earlier CBAs, without the consent of the prior retirees and in a manner that disadvantaged the prior retirees. In light of this factual finding, the panel concluded that it must have been the understanding of the parties that the 1998 CBA, which included the same language as the earlier CBAs, created lifetime healthcare benefits that could be unilaterally reduced without the consent of the retirees. Crucial to the panel's conclusion that the parties viewed the benefits as subject to possible future unilateral reduction was the panel's determination that the benefits of prior retirees had been unilaterally *reduced* in the past; the panel acknowledged that, had the benefits been *improved* in the past without the consent of the prior retirees, "[t]hat sort of change would not break any promises to provide irreducible benefits for life." *Reese I*, 574 F.3d at 325. Critically, however, this Court never made the crucial factual finding that benefits had been reduced in the past. Rather, that factual determination was made in the first instance by the *Reese I* panel – a clear encroachment on the factfinding function of this Court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92, 102 S. Ct. 1781, 1791-92 (1982) ("[F]actfinding is the

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retain some flexibility to deal with future vicissitudes, but such an arrangement must be agreed to in the contract. It cannot be imposed unilaterally by the employer or the courts.").

basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance [a] factual dispute which had not been considered by the District Court." (internal quotation marks and citation omitted)).

Based in large part on the "historical feature" discussed above, the *Reese I* panel concluded that "CNH . . . cannot terminate all health-care benefits for retirees, but it may reasonably alter them." 574 F.3d at 327. In particular, the panel held that the 1998 CBA "permit[s] modifications . . . that are 'reasonably commensurate' with the benefits provided in the 1998 CBA, 'reasonable in light of changes in health care' and roughly consistent with the kinds of benefits provided to current employees." *Id.* at 326 (quoting *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 619, 620 (7th Cir. 2006)). The panel then remanded the matter "to decide how and in what circumstances CNH may alter such benefits – and to decide whether it is a matter amenable to judgment as a matter of law or not." *Id.* at 327.

In this Court's view, the panel sent conflicting messages regarding one aspect of its decision. Relying on its own factfinding – principally, the finding that prior retiree benefits had been downgraded in the past without the consent of the prior retirees – the panel seemingly concluded that the 1998 CBA permitted unilateral reductions to retiree healthcare benefits. However, Judge Sutton's concurrence to the panel's order denying Plaintiffs' motion for rehearing

significantly confused matters.[3] Using language suggesting an intent to speak on behalf of the panel and offering insight into what the panel envisioned during the remand proceedings, Judge Sutton wrote:

> Plaintiffs also protest our assessment of the factual record arguing that the prior retirees approved the changes to their benefits or at the least that they helped them overall. But this argument overlooks the posture of this case – summary judgment – in which the inferences run in favor of the party that lost below: CNH. On remand, the parties are free to develop evidence on this point. That evidence may show that plaintiffs should win as a matter of law because the prior retirees either approved the changes or they did not diminish the nature of the benefits package that existed upon retirement. Or it may show that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language.

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[3] Following *Reese I*, Plaintiffs filed a motion for rehearing, arguing that the panel decided an issue that was not raised by the parties (i.e., "What does vesting mean" in the context of this case?) and misconstrued the record, reaching factual conclusions that were crucial to the panel's holding but that were unsupported by the record.

Reese v. CNH Am. LLC, 583 F.3d 955, 956 (6th Cir. 2009) (Sutton, J., concurring).[4] The parties and this Court were, therefore, given permission to "develop the evidence" on whether "the prior retirees . . . approved the changes" and on whether the previous modifications "diminished the nature of the [prior retirees'] benefits package" – the special fact on which the panel relied to reach the conclusion that this case is not subject to the usual rule that lifetime healthcare benefits are unalterable. In other words, the parties were given express authorization to submit evidence on remand negating the reasoning underlying the panel's conclusion that lifetime healthcare benefits could be unilaterally reduced, a conclusion that Judge Sutton indicated the panel reached as a result of an inference applied in favor of Defendants – an inference that he said could be overcome through the submission of evidence on remand. In sum, the concurrence demonstrates unequivocally that this Court was free on remand to conclude that Defendants could not unilaterally modify the benefits, provided that the evidence offered during the remand proceedings supported the conclusion that the special inferred fact on which the panel relied to reach a contrary conclusion was not, in fact, true.

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[4] On remand, this Court addressed whether it could consider Judge Sutton's concurrence to clarify the panel's decision, even though the other two judges on the panel did not formally join it. Ultimately, the Court concluded that it could and should consider the concurrence in light of the fact that Judge Sutton authored the opinion for the unanimous panel in *Reese I*. *See* 2011 WL 824585, at *7.

On remand, this Court considered the evidence contemplated in the concurrence and reached the conclusion that Defendants could not unilaterally reduce the healthcare benefits conferred to Plaintiffs under the 1998 CBA. In so holding, the Court concluded that the previous modifications, which were reached through the bargaining process, were not disadvantageous to the prior retirees. *See Reese*, 2011 WL 824585, at *8-9. Again, the concurrence authorized the parties to submit evidence on this issue, noting that "[the] evidence may show that plaintiffs should win as a matter of law" if it is proven on remand that "the changes . . . did not diminish the nature of the benefits package that existed upon retirement." *Reese*, 583 F.3d at 956 (Sutton, J., concurring). Having concluded that the changes did not diminish the nature of the benefits package that existed upon retirement, this Court – following the path paved by the guiding words of the concurrence – held that Plaintiffs should prevail as a matter of law.

Defendants appealed again, resulting in another Sixth Circuit decision – *Reese II*. Writing on behalf of himself and Judge Gibbons, Judge Sutton faulted this Court by stating that it "misread" *Reese I* and "disregarded [its] holding that the company may make reasonable modifications to the plaintiffs' healthcare benefits," *Reese II*, 694 F.3d at 685, without mentioning his opinion concurring in the decision to deny a panel rehearing. The panel also adhered to its previous factual finding, made in the first instance by a panel of appellate judges in *Reese I*, that the healthcare benefits of the prior retirees had been reduced in the past. Shockingly, the panel did not address this Court's conclusion on remand – a conclusion that Judge Sutton

contemplated in his concurrence – that the past changes were not a reduction of the prior retirees' benefit package.

Judge Donald dissented. In her dissent, Judge Donald pointed out the errors made by the majority and expressed her belief that *Reese I* should be overruled and judgment entered in favor of Plaintiffs because "CNH may [not] unilaterally modify the scope of Plaintiffs' retirement health benefits under the 1998 CBA." *Reese II*, 694 F.3d at 691 (Donald, J., dissenting).

The *Reese II* panel instructed this Court as follows regarding its task on remand – a task that the panel described as a "vexing one," *Reese II*, 694 F.3d at 686:

> To gauge whether CNH has proposed reasonable modifications to its healthcare benefits for retirees, the district court should consider whether the new plan provides benefits "reasonably commensurate" with the old plan, whether the changes are "reasonable in light of changes in health care" (including access to new medical procedures and prescriptions) and whether the benefits are "roughly consistent with the kinds of benefits provided to current employees." *Reese I*, 574 F.3d at 326. In doing so, the district court should take evidence on the following questions (and others it considers relevant to the reasonableness question):
>
> - [1] What is the average annual total out-of-pocket cost to retirees for their healthcare under the old plan (the 1998 Group Benefit

Plan)? What is the equivalent figure for the new plan (the 2005 Group Benefit Plan)?

- [2] What is the average per-beneficiary cost to CNH under the old plan? What is the equivalent figure for the new plan?
- [3] What premiums, deductibles and copayments must retirees pay under the old plan? What about under the new plan?
- [4] How fast are the retirees' out-of-pocket costs likely to grow under the old plan? What about under the new plan? How fast are CNH's per-beneficiary costs likely to grow under each?
- [5] What difference (if any) is there between the quality of care available under the old and new plans?
- [6] What difference (if any) is there between the new plan and the plans CNH makes available to current employees and people retiring today?
- [7] How does the new plan compare to plans available to retirees and workers at companies similar to CNH and with demographically similar employees?

Id. at 685-86.

Following the second remand, Defendants submitted a proposed new plan and the parties engaged in discovery relating to the seven considerations listed above. In April 2014, after the conclusion of discovery, the parties filed cross-motions

for summary judgment. In addition, Plaintiffs filed a motion to strike the declarations of two defense experts.

Shortly before the Court heard oral argument on the parties' cross-motions for summary judgment, the Supreme Court issued its decision in *Tackett*, a case that was on appeal from the Sixth Circuit. In that case, the Court held "that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement." 135 S. Ct. at 937 (Ginsburg, J., concurring). In so holding, the Court abrogated the line of cases in the Sixth Circuit, beginning with *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), that applied presumptions or inferences in favor of the conclusion that retiree benefits were intended to survive the expiration of the CBA in situations where the duration of retiree benefits was not explicitly specified in the CBA.

Following the Supreme Court's decision in *Tackett*, Defendants filed a second motion for summary judgment. In their motion, Defendants argue that the reasons underlying the conclusion of this Court and the Sixth Circuit that Plaintiffs are entitled to lifetime healthcare benefits are no longer viable after *Tackett*. According to Defendants, *Tackett* mandates a conclusion that the healthcare benefits promised to Plaintiff do not survive the expiration of the CBA. Plaintiffs disagree, arguing that the reasoning employed by this Court and the Sixth Circuit to conclude that retiree healthcare benefits were intended

to last forever is consistent with the rules of contract interpretation set forth in *Tackett*.

The question at issue in Defendants' second summary judgment motion – whether the conclusion that retirees are entitled to lifetime healthcare benefits remains correct after *Tackett* – is a threshold one. If Defendants are correct that benefits do not survive the expiration of the CBA, then the Court need not decide the issue that is the subject of the parties' earlier-filed cross-motions for summary judgment – whether the changes proposed by Defendants to Plaintiffs' healthcare benefits are reasonable under the standard articulated by the Sixth Circuit in *Reese II*. The Court now addresses *Tackett*'s impact on this Court's earlier determination that Plaintiffs are entitled to healthcare benefits for life.

III. DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT: *TACKETT*'S IMPACT ON THIS CASE

A. The Parties' Arguments

As discussed, the issue raised in Defendants' second motion for summary judgment is whether the Supreme Court's recent decision in *Tackett* impacts this Court's earlier conclusion that Plaintiffs are entitled to healthcare benefits for life. On the one hand, Defendants argue that *Tackett* mandates the conclusion that retiree healthcare benefits do not survive the expiration of the CBA because the Court's contrary conclusion rested on the legal principles grounded in *Yard-Man* that were abrogated by *Tackett*. On the other hand, Plaintiffs contend that *Tackett* does not impact the Court's conclusion that Plaintiffs are

entitled to lifetime benefits because, in reaching that conclusion, this Court relied on only the aspects of the *Yard-Man* framework that remain viable after *Tackett*. For the reasons that follow, the Court believes that Defendants' argument is the more persuasive one.

B. The *Tackett* Decision

Tackett addressed how courts should determine how long retirees are entitled to healthcare benefits when the applicable CBA confers such benefits but does not explicitly specify their duration. The CBA in *Tackett* provided that retirees of a certain age and with a certain level of seniority "will receive" contribution-free benefits, but did not explicitly specify the duration of those benefits. After the expiration of the CBA, the employer began requiring retirees to contribute toward the cost of their health insurance. The retirees sued, alleging that they had a right to free benefits that continued beyond the expiration of the CBA – forever. The employer argued that it was only obligated to provide free benefits during the life of the CBA, but not after its expiration.

Applying the *Yard-Man* framework, discussed below, the Sixth Circuit ruled in favor of the retirees, concluding that they had a right to lifetime benefits. The Supreme Court, however, vacated the Sixth Circuit's judgment, holding that certain aspects of the legal framework used by the Sixth Circuit to interpret the CBA, derived from *Yard-Man* and its progeny, are inconsistent with ordinary principles of contract interpretation.

The aspect of the *Yard-Man* framework that was most heavily criticized in *Tackett* is the application of inferences or presumptions in favor of the conclusion that parties intended to create lifetime benefits. Under the *Yard-Man* framework, if a CBA is silent regarding the duration of benefits, courts could infer that the parties intended them to last for life based on the "context" of labor-management negotiations, *see Yard-Man*, 716 F.2d at 1482 ("[E]xamination of the context in which these [retiree] benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended."), and the general "nature" of retiree benefits, *see id.* ("[R]etiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained."). The Supreme Court concluded that these inferences conflict with ordinary principles of contract interpretation by "placing a thumb on the scale in favor of vesting retiree benefits in all collective-bargaining agreements." *Tackett*, 135 S. Ct. at 935.

In addition to these inferences, *Tackett* faulted the Sixth Circuit's unwillingness to apply general durational clauses, CBA provisions specifying the expiration date of the CBA, to retiree benefits. In *Yard-Man*, the Sixth Circuit concluded that the inferences discussed in the preceding paragraph "outweigh any contrary implications derived from a routine duration clause terminating the agreement generally," *Yard-Man*, 716 F.2d at 1482-83, and, in a subsequent case, held that "a general durational clause says nothing about the vesting of retiree benefits." *Noe v. PolyOne Corp.*, 520 F.3d 548, 555 (6th Cir. 2008). *Tackett* held that the Sixth Circuit's approach – refusing to apply

general durational clauses to retiree benefits conferred in the contract, instead requiring a contract to include a specific durational clause mentioning retiree benefits to prevent vesting – "distort[s] the text of the agreement and conflict[s] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." 135 S. Ct. at 936.

Tackett further criticized *Yard-Man* and its progeny for ignoring "the traditional principle that courts should not construe ambiguous writings to create lifetime promises" and for "fail[ing] to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" 135 S. Ct. at 936-37 (quoting *Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 207, 111 S. Ct. 2215, 2226 (1991)). The Court approved the Sixth Circuit's holding that "'traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation,'" but faulted the Sixth Circuit for concluding that "'the duration of the benefit once clearly conferred is [not] subject to this stricture.'" *Id.* (quoting *Yard-Man*, 716 F.2d at 1481 n.2). According to the Supreme Court, the rule that contract obligations normally cease upon expiration of the contract "does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees," but "a court may not infer that the parties intended benefits to vest for life" "when a contract is silent as to the duration of [those] benefits." *Id.* at 937. In other words, for a court to conclude that the parties intended to confer lifetime benefits for retirees, it must find both that the parties intended to confer retiree benefits, as well as a clear

manifestation of intent from the contract language that they intended to confer them for life; courts may not infer that the parties intended to confer lifetime benefits based simply on the fact that retiree benefits were conferred.

Tackett concluded that the impermissible aspects of the *Yard-Man* framework, discussed above, affected the outcome of the case because the Sixth Circuit relied on the context of labor-management negotiations and the nature of retiree benefits to reach the conclusion that the parties intended to create lifetime benefits. *See id.* Because the Sixth Circuit "framed its analysis from beginning to end in light of the principles it announced in *Yard-Man* and its progeny," the Court remanded the matter to the Sixth Circuit "to apply ordinary principles of contract law in the first instance." *Id.*

In sum, *Tackett* changed the rules governing the analysis of whether parties intended to create lifetime retiree benefits in the following ways:

- Courts may no longer infer that the parties intended to confer lifetime benefits based on the context of labor-management negotiations.
- Courts may no longer infer that the parties intended to confer lifetime benefits based on the nature of retiree benefits.
- Courts may no longer categorically refuse to apply general durational clauses to retiree benefits.
- Courts should give effect to the traditional contract principle that contractual obligations

will cease, in the ordinary course, upon termination of the bargaining agreement.

- Courts should give effect to the traditional contract principle that ambiguous writings should not be construed to create lifetime benefits.

- To conclude that the parties intended to confer lifetime benefits, there must be a clear manifestation of intent, grounded in the contractual language, to confer lifetime benefits.

C. Application of *Tackett*

The rationale underlying this Court's prior determination that Plaintiffs are entitled to lifetime healthcare benefits is consistent with the rules of interpretation pronounced in *Tackett* in some respects, but inconsistent with those rules in other respects. The Court addressed whether Plaintiffs are entitled to lifetime benefits in its decision dated August 29, 2007. *See Reese*, 2007 WL 2484989, at *5-9. In determining that the parties intended to confer lifetime benefits, the Court relied in large part on its decision in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006), a companion case over which this Court presided involving similar claims and a CBA that is nearly identical to the one at issue in the present case. *See Reese*, 2007 WL 2484989, at *6 ("The defendants in *Yolton* raised the same arguments to support their claim that the [parties] did not intend retiree health insurance benefits to vest that CNH presents now. For the same reason this Court rejected those arguments in

Yolton, it rejects them in this case.").[5] In both *Yolton* and the present case, the Court did not infer that the parties intended to create lifetime benefits based on the context of labor-management negotiations or the nature of retiree benefits. In fact, on review of this Court's decision in *Yolton*, the Sixth Circuit explicitly noted that this Court did not apply those inferences:

> [T]here is no indication that the district court applied either a presumption or relied unnecessarily on the *Yard-Man* inference. Citing *Yard-Man*, the district court correctly stated that "courts must apply basic rules of contract interpretation to discern the intent of the parties." *Yolton*, 318 F. Supp. 2d at 465. The district court did mention the inference and noted that Sixth Circuit case law has not repudiated the *Yard-Man* language, but the court's analysis does not in any sense *rely* on an inference. *Id.* at 465-68. Instead, the district court interpreted the language of the agreement and found evidence that the defendants intended to confer lifetime benefits upon the plaintiffs. *Id.* at 466.

Yolton, 435 F.3d at 580 (emphasis in original). Inasmuch as the Court did not apply the impermissible inferences, the Court's analysis is consistent with *Tackett*. However, as explained, the repudiated aspects of the *Yard-Man* framework include more than just the

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[5] Because the Court was tasked in *Yolton* with resolving a motion for preliminary injunction, the relevant legal question there involved the retirees' likelihood of success on the merits as opposed to their actual success on the merits.

inferences related to the context of labor management relations and nature of retiree benefits.

In concluding that the parties intended to confer lifetime benefits to the retirees in *Yolton* and the present case, the Court relied heavily on contract language tying eligibility for contribution-free healthcare benefits to eligibility for pension benefits. Because pension benefits are presumed to last for life, and because eligibility for healthcare benefits is linked to eligibility for pension benefits, the Court concluded that healthcare benefits, like pension benefits, were intended to last for life. *See Yolton*, 318 F. Supp. 2d at 466; *Reese*, 2007 WL 2484989, at *6. However, for the reasons that follow, *Tackett* forecloses reliance on this rationale.

Tackett referenced the tying rationale in the section of the decision addressing how the impermissible aspects of the *Yard-Man* framework affected the outcome of the case, observing that the Sixth Circuit below relied on contract language "tying . . . eligibility for health care benefits to receipt of pension benefits":

> There is no doubt that *Yard-Man* and its progeny affected the outcome here. As in its previous decisions, the Court of Appeals here cited the "context of . . . labor-management negotiations" and reasoned that the Union likely would not have agreed to language ensuring its members a "full Company contribution" if the company could change the level of that contribution. It similarly concluded that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits. And it framed its

> analysis from beginning to end in light of the principles it announced in *Yard-Man* and its progeny.

135 S. Ct. at 937 (citations omitted). This reference to the tying rationale in the Supreme Court's discussion of how the impermissible aspects of the *Yard-Man* framework affected the outcome of the case suggests, as Defendants argue, that the Supreme Court deems the tying rationale to be one of the impermissible aspects of the *Yard-Man* framework. Because the tying rationale was, in the words of the Sixth Circuit, "[of] particular significance" to this Court in concluding that the parties intended to confer lifetime healthcare benefits for retirees, *Yolton*, 435 F.3d at 580, and because, according to Defendants, the tying rationale is no longer sound after *Tackett*, Defendants argue that this Court's decision that Plaintiffs are entitled to lifetime benefits cannot stand.

Before proceeding further, the Court clarifies the precise nature of the tying rationale that was criticized in *Tackett*. *Tackett* suggests that courts should not rely on language "tying . . . *eligibility* for health care benefits to receipt of pension benefits." 135 S. Ct. at 937 (emphasis added). It does not suggest that courts cannot rely on language tying the *duration* of retiree healthcare benefits to the receipt of benefits. There is a difference. An example of the latter is contract language providing that a retiree is entitled to contribution-free healthcare benefits for *as long as* he or she is entitled to pension benefits. If it is settled that retirees are entitled to pension benefits forever, then it would defy logic – and presumably violate ordinary principles of contract interpretation – to hold that the

parties did not intend to confer healthcare benefits for life. Language like this speaks directly to the duration of retiree benefits and there is nothing in *Tackett* suggesting that courts cannot rely on such language.

The view that *Tackett* does not foreclose reliance on language tying the *duration* of contribution-free healthcare benefits to the receipt of pension benefits is shared by the four concurring Justices in *Tackett*. Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg observed in her concurrence: "Because the retirees have a vested, lifetime right to a monthly pension, a provision stating that retirees 'will receive' health-care benefits if they are 'receiving a monthly pension' is relevant to [the vesting] examination," and that she "understand[s] the Court's opinion to be consistent with" that approach. *Id.* at 938 (Ginsburg, J., concurring) (citations to the record omitted).

However, *Tackett* does suggest that courts should not rely on language tying *eligibility* for contribution-free healthcare benefits to the receipt of pension benefits. An example of such language is a provision providing that a retiree is *eligible* for contribution-free healthcare benefits if he or she is receiving pension benefits. This language arguably speaks to how retirees become eligible to *start receiving* free healthcare benefits, not the *amount of time* they *remain entitled* to those benefits. Because *Tackett* admonishes courts not to "construe ambiguous writings to create lifetime promises," 135 S. Ct. at 936, language tying mere eligibility for contribution-free benefits to receipt of pension benefits, as opposed to language tying the duration of contribution-free benefits to receipt of

pension benefits, no longer supports the conclusion that parties intended to create lifetime benefits.

The pertinent contract language here ties *eligibility* for contribution-free healthcare benefits to the receipt of pension benefits: "Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for" healthcare benefits, and "no contributions are required." In light of *Tackett*, this Court now interprets this provision as addressing how retirees and their spouses become eligible to start receiving free healthcare benefits – i.e., retirees are "eligible" for free healthcare benefits if they "retire under" the company's pension plan, and surviving spouses are "eligible" for free healthcare benefits if they are "eligible" to receive the deceased spouse's pension – not the amount of time retirees and their spouses remain entitled to those benefits. Therefore, the tying language used here no longer supports the Court's determination that the parties intended to confer lifetime benefits.

The remainder of the reasons underlying the Court's prior conclusion that Plaintiffs are entitled to lifetime healthcare benefits are either not sufficient on their own to support that conclusion or are no longer viable reasons under *Tackett*. For example, the Court relied on the fact that the contract contained express durational clauses for other categories of benefits but not for retiree healthcare benefits. Relying on *Yard-Man* for the proposition that "the inclusion of specific durational limitations in other provisions . . . suggests that retiree benefits, not so specifically limited, were

intended to survive," 716 F.2d at 1481, this Court in *Yolton* and the present case ascribed no weight to the general durational clauses contained in the contracts and concluded that the absence of a durational clause specifically governing retiree healthcare benefits suggested an intent to confer lifetime benefits. *Yolton*, 318 F. Supp. 2d at 466-67; *Reese*, 2007 WL 2484989, at *6. This reasoning, however, is not compatible with *Tackett*, which: (1) requires a clear manifestation of intent showing that the parties intended to confer lifetime benefits, *see* 135 S. Ct. at 936-37, (2) admonishes courts not to ignore general durational clauses, *see id.* at 936, and (3) requires courts to "consider the traditional contract principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (quoting *Litton*, 501 U.S. at 207, 111 S. Ct. at 2226).

There is a disagreement among the parties whether "clear and express" contract language is necessary under *Tackett* to show an intent to confer lifetime benefits. On the one hand, Defendants contend that *Tackett* quoted with approval language from a Sixth Circuit case stating that "'the intent to vest must be found in the plan documents and must be stated in clear and express language.'" *Tackett*, 135 S. Ct. at 937 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)). Defendants also point to *Tackett*'s statement that "'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" *Id.* (quoting *Litton*, 501 U.S. at 207; 111 S. Ct. at 2226). On the other hand, Plaintiffs emphasize the observation of the concurring Justices that they "understand the Court's

opinion to be consistent" with the principle that "no rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest." *Id.* at 938 (Ginsburg, J., concurring).

Regardless of whether *Tackett* requires "clear and express" language to show an intent to confer lifetime benefits, the Court believes, at a minimum, that a court must find a clear manifestation of intent, evinced in the language of the contract, before concluding that the parties intended to confer lifetime benefits. *See* 135 S. Ct. at 936-37 (criticizing the *Yard-Man* principle that "a clear manifestation of intent" is required to "confer[] a benefit or obligation" but not required to discern "the duration of the benefit once clearly conferred"). Applying the rules of interpretation articulated in *Tackett*, the Court does not find a clear manifestation of intent to confer lifetime benefits in this case.

Finally, the Court rejects Plaintiffs' argument that the "law of the case" doctrine prevents the Court from revisiting its prior decision that the parties intended to confer upon Plaintiffs lifetime healthcare. "Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 2017 (1997). As Defendants correctly point out, an exception to doctrine applies here. *See id.* ("Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent"); *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (doctrine

does not apply "where a subsequent contrary view of the law is decided by the controlling authority").[6]

For all these reasons, the Court concludes that its prior determination that the parties intended to confer lifetime healthcare benefits is no longer viable in light of the Supreme Court's intervening decision in *Tackett*.

IV. CONCLUSION

For the reasons stated, Defendants' later-filed motion for summary judgment is **GRANTED**; all other pending motions are **DENIED AS MOOT**.

SO ORDERED.

Dated: September 28, 2015

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

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[6] Plaintiffs also argue that the Court should defer ruling on *Tackett*'s impact on this case pending the Sixth Circuit's decision on remand in *Tackett*: "To the extent that this Court has concerns over the impact of *Tackett* on the issue of vesting, this Court should wait for guidance from the Sixth Circuit's review of *Tackett* on remand." Pls.' Resp. at 23 (ECF No. 441). However, Plaintiffs cite no authority supporting this approach and the Court is aware of none.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15-2382

[Filed August 28, 2017]

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,	)
Plaintiffs-Appellees,	)
v.	)
CNH INDUSTRIAL N.V.; CNH INDUSTRIALAMERICA, LLC,	)
Defendants-Appellants.	)

ORDER

BEFORE: GIBBONS, SUTTON, and DONALD, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then

were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

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* Judge White recused herself from participation in this ruling.

APPENDIX E

CASE III

Central Agreement

Between

Case Corporation

and

International Union,
United Automobile,
Aerospace and
Agricultural Implement
Workers of America
and

Local Agreement

Local Union No. 1356T
East Moline, Illinois

May 14, 1998

* * *

[Pg. 76]

Section 4. Group Insurance and Pension.

A. The group insurance plan agreed to between the parties will run concurrently with this Agreement and is hereby made part of this Agreement.

* * *

[Pg. 80]

Section 9. Scope of Agreement.

This Agreement disposes of any and all bargaining issues, whether or not presented during negotiations, except with respect to the processing of grievances as provided in Article VII, and shall remain in full force and affect without further change until the expiration thereof.

* * *

[Pg. 81]

ARTICLE XV
TERMINATION

This Agreement (including both Central and Local understandings) shall continue in full force and effect through May 2, 2004 and thereafter from year to year unless sixty (60) days prior to such date either party gives notice in writing of a desire to terminate this Agreement.

* * *

APPENDIX F

CASE / UAW

GROUP BENEFIT PLANS

1998 NEGOTIATIONS

* * *

[Pg. 65]

I. Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension

1) Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a. spouse's pension under the provisions of that Plan, shall be eligible for the Group benefits as described in the following paragraphs. All other coverages cease coincident with the date of employment termination due to retirement. (The provisions of this section shall not apply to individuals eligible for or receiving retirement benefits under the deferred vested provisions of the Pension Plan.)

* * *

[Pgs. 78–79]

LETTER OF UNDERSTANDING

Re: National and State Health Insurance Initiatives

This confirms our understanding !hat if, during the term of the 1998 Collective Bargaining Agreement, any Federal or State health security act is enacted or amended to provide hospital, surgical, medical, prescription drug, dental benefits, vision care, or hearing care for employees, retired employees, surviving spouses and dependents, which duplicate or may be integrated with the benefits of the Group Benefits Plan, then in such event, the benefits under the Group Benefits Plan will be modified so as to integrate or eliminate the duplication of such benefits with the benefits provided by such Federal or State law.

If any Federal or State health security act is enacted or amended as provided in the paragraph above, the Company will pay through the term of the 1998 Collective Bargaining Agreement any premiums, taxes or contributions employees may be required to pay under the law when they become effective, that are specifically earmarked or designated for the purpose of financing the program of benefits provided by law, and any savings realized by the Company from integrating or eliminating the duplication of benefits provided under the Group Benefits Plan with the benefits provided by law, shall be retained by the Company. If such tax on employees is based on wages, the Company will pay only the tax applicable to wages received from the Company.

This understanding is conditioned on the Company obtaining and maintaining such governmental approvals as may be required to permit the integration of the benefits under the Group Benefits Plan with the benefits provided by any such law.

International Union, UAW Case Corporation

* * *

LETTER OF UNDERSTANDING

Re: Cost of Healthcare Coverage

During the 1998 contract negotiations the Company and the Union agreed that over the term of the 1998 labor agreement employees and retirees who are enrolled in a Company offered HMO, PPO or other plan will not have to pay any additional employee contributions above those which may be required for enrollment in the Case Network Plan (if any).

The Company will be responsible for the retention of HMOs, PPOs and other health care delivery mechanisms during the term of this agreement. In the event that any offered HMO or PPO does not continue to provide access and high quality, cost effective care on a sustaining basis to Case UAW members, the Company may exercise its right to terminate that provider, provided that a replacement plan is instituted that meets the requirements described below. The Company will give the Union at least ninety (90) days notice of its desire to replace a provider and the Company and Union will work together in the selection of the replacement plan. Any replacement plan will provide comparable benefits and access to the type of plan it replaces. If the replacement plan is an HMO or

PPO it will satisfy the UAW' s standards regarding access and quality for that type of plan.

The same principles will govern the selection of additional (as opposed to replacement) HMOs, PPOs or POS plans to be made available to Case UAW members.

International Union, UAW Case Corporation

No. 17-515

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. &
CNH INDUSTRIAL AMERICA, LLC,
Petitioners,

v.

JACK REESE; JAMES CICHANOFSKY;
ROGER MILLER; GEORGE NOWLIN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit's decision is consistent with *M & G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015) when it held, for the third time, that CNH contracted to provide vested lifetime retiree healthcare benefits to the Class, applying ordinary contract principles to the contractual language, finding at least an ambiguity as to vesting, and giving effect to the undisputed and extensive extrinsic evidence and admissions that the parties intended to vest the benefits.

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B. The array of decisions in the Sixth Circuit following *Tackett* are the natural result of the application of *Tackett* to complex and varied facts, not a failure to correctly apply *Tackett*. . 20

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APPENDIX

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STATEMENT OF THE CASE

A. Factual background

The Respondents are a class of CNH retirees (and their spouses). While employed, the retirees were represented in labor negotiations by the United Automobile, Aerospace and Agricultural Workers of America ("UAW").

CNH and its predecessors[1] entered into a series of collectively bargained agreements ("CBAs") with the UAW, called "Central Agreements." Collectively bargained group insurance benefits were contained in a separate document, the "Group Insurance Plan," and incorporated into the Central Agreements.

For decades, and over the course of several successive Central Agreements, lifetime pension benefits and healthcare benefits were extended to retirees through language similar or identical to that found in the 1998 CBA. App. 1-2. Over many collectively bargained contracts, the meaning of that contract language was reinforced by the parties' conduct and admissions.[2]

Those who repeatedly collectively bargained for the pension and retiree healthcare benefits understood them to be vested, lifetime benefits. Case's Director of Benefits and Practices told retirees in 1971 that the Company would fully cover benefits and that benefits

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[1] CNH refers to CNH and its various predecessors, including J.I. Case and Case.

[2] See Doc. 129 at 5150 to 5163 (Motion for Summary Judgment).

would be in effect for life. *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455, 469 (E.D. Mich. 2003).[3] Case benefits administrators and managers were told and in turn told retiring employees "that their medical insurance benefits would continue unchanged for their lifetime ..." *Id.* Documents related to various plant shutdown retirement agreements reflect that health insurance benefits "continu[ed] unchanged" "[f]or lifetime." *Id.* Medical insurance cards issued to retirees from Case's Industrial Relations Department in Terre Haute, Indiana contain the words "Lifetime" or "Lifetime Coverage." *Id.* Benefits information issued to employees upon retirement stated that the retiree and spouse were entitled to full health insurance coverage and that if the retiree predeceased his wife, her coverage "would continue as before" and would only change if she remarried. *Id.* at 469-470. Further, under a section entitled "Spouse's Benefits," the summary provided to the employee states that "In the event that you should die before your spouse and a spouse's option was spplied [sic] for, she will receive 55% of your pension for her lifetime along with the insurance which was mentioned previously." *Id.* at 470. Numerous other retirees and surviving spouses were told by Case benefits representatives that they would receive post-retirement lifetime health insurance coverage fully paid for by the company. *Id.* Some of their affidavits

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[3] *Yolton* was a parallel lawsuit involving the same claims against another successor in interest. *Yolton* and *Reese* share the same bargaining history and same operative language vesting retiree healthcare benefits.

include the accompanying documentation promising fully funded health insurance for life. *Id.*[4]

The parties brought their understanding of the meaning of their contract language with them each time they sat at the bargaining table and repeatedly adopted the same language into a new Central Agreement.[5]

In 1998, the identical, serially adopted language meant what CNH historically and repeatedly said it meant: that the class would receive retiree medical benefits for life. In the incorporated 1998 Group Benefit Plan, the language was, again, virtually unchanged. App. 3-5.

Although CNH references itself as a "new entity" entering into negotiations after 1994, the same negotiators made the same promises throughout the 1990s, regardless of any change in corporate form. Management's negotiating team signed the CBAs: Tim Haas was CNH's Manager of Benefits and Director of Benefits from 1990. Haas identified Paul Crist as the person who developed negotiation strategy around benefits, including for retirees in 1990. Crist negotiated

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[4] *See also* Doc. 129 at 5150 to 5167 (Motion for Summary Judgment) for a description of the evidence, which has never been contested by CNH, of the parties' express understanding that the retiree healthcare benefits were promised for life.

[5] CNH selectively cites to the record below, ignoring the entirety of the parties' collective bargaining history. CNH also repeatedly references contracts that "expire" are "superseded" or end on a "date certain." CNH's linguistic supposition that *all of the terms* "expire" at the end of a particular CBA is not only logically circular but begs the very question it asks this Court to decide.

in 1995 and 1998 as well. In 1990,[6] 1995 and 1998, the exact same language was adopted to vest pension benefits and retiree healthcare benefits. Doc. 129-11 at 5168 to 5186 (Signatures) and Doc. 129-33 at 5566 to 5585 (Haas Affidavit).

Further evidencing the parties' intent that the retiree healthcare obligations continued beyond the expiration of the contract, the parties agreed to place caps on its obligations for retiree healthcare in 1990 and 1993. App. 3 (Excerpts from 1993 Extension Agreement, Letter of Agreement). During the 1995 negotiations, the UAW and Case agreed to extend the effective date of the caps until January 1, 1999.[7] To be

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[6] In the 1990 negotiations, Case agreed to provide healthcare benefits for a surviving spouse of a disability retiree who, through a quirk in the pension plan, was not receiving a survivor pension. After the negotiations, Case wrote to this surviving spouse, telling her she would have the "same [healthcare benefits] as those provided to other surviving spouses of deceased retirees" and she would "now have those coverages for your lifetime." Case copied Jack Reese, the UAW's chief negotiator, confirming that Case had complied with its agreement. Doc.153 at 6737 (Devine Letter). In 1991 through 1992, Case negotiated with the UAW for voluntary early retirement benefits to reduce its work force, Case and the UAW held mass meetings with prospective retirees. At early retirement seminars on November 18, 1991 and March 12, 1992, Case passed out sheets outlining the benefits retirees would have under the program. As to surviving spouses, Case wrote that **"the surviving spouses will continue all medical, dental, vision, etc. coverages for life."** Doc. 129-10 at 5758 to 5762, 5767 and 5775 (Graham Deposition and Exhibits) (emphasis added).

[7] The 1990 Group Benefits Plan was effective from June 2, 1990 through October 2, 1993. The 1993 Extension Agreement extended the 1990 Central Agreement through February 5, 1995. Doc. 273-7 at 10129 and Doc. 273-8 at 10132.

clear, the caps *did not become effective until after the expiration* of the 1990 Central Agreement and the 1993 Extension Agreement. During the 1998 negotiations, Case agreed to eliminate the caps at the UAW's insistence, thereby agreeing to provide uncapped benefits. Doc. 273-51 at 10599 to 10632 (Tentative Agreement).

CNH overstates the importance of the changes made in 1998 to the healthcare benefits. Those changes were designed to address a problematic[8] healthcare plan and to *improve benefits*. Improving benefits is not inconsistent with vesting. As Judge Sutton stated in *Reese I*, improvement of benefits would not "break any promises to provide irreducible benefits for life." *Reese I*, at 325.

During the 1995 negotiations, Case proposed substituting a managed healthcare plan for the Indemnity Plan for active employees and current retirees. In 1995, the UAW and Case agreed to retain the Indemnity Plan as it then existed for active employees and current retirees. However, the UAW and Case also agreed that the Case Managed Care Network Plan ("1995 Network Plan") would be

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[8] From before 1974 and until 1998, the basic healthcare plan for Case hourly active employees and retirees was the Case indemnity healthcare plan ("Indemnity Plan"). Disputes between the UAW and Case about "reasonable and customary" fees and the "hold harmless" provision of the Indemnity Plan were common leading up to 1998 negotiations. Doc. 273-13 at 10275 to 10347 (Dispute Documentation).

mandatory for newly hired employees and *optional*[9] for existing employees and current retirees. Tentative Agreement, Doc. 273-16 at 10374 and 10380. Many employees and retirees opted for the Managed Care Plan in lieu of the disfavored Indemnity Plan.

During the 1998 negotiations, the parties bargained over healthcare benefits. Ultimately, Case and the UAW agreed to replace the Indemnity Plan with a "high quality Case Managed Care Health Network Plan (PPO design)" for current active employees and retirees. Doc. 273-51 at 10614 (Benefit Detail). This Court, in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) required pensioners' consent to a reduction in vested benefits. *Improvements* to vested benefits do not require consent. *Reese I* at 325, *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971). These changes

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[9] CNH claims that the Letter of Understanding Re: Cost of Healthcare Coverage contemplated that there would be no "additional employee contributions ... over the term of the 1998 labor agreement" at p. 4 and, therefore contributions could be required when the agreement expired. Very importantly, **this quote does not reference contributions to the company-sponsored plan**. Active employees and retirees could upgrade their benefits by opting for plans other than the company-sponsored basic plan. The *basic plan*, or the Network option, required no contribution, whereas the *optional* plans, or non-Network options, required contribution to premium payments, *if* those plans exceeded the employer's cost for the *basic plan*. **The quoted reference is to contributions for the *optional plans*** over the term of the 1998 labor agreement. There was never any contribution for the basic plan. *Reese v. CNH Glob. N.V.*, No. 04-70592, 2011 WL 824585, at *8 (E.D. Mich. Mar. 3, 2011) (citations omitted).

were uniformly considered improvements over the Indemnity Plan.[10]

CNH overstates the importance of the "National and State Health Insurance Initiatives" which addresses the situation where federal or state governments provide healthcare benefits that are also provided under the CBA. While the letter allows modifications to the agreement in the event that a government provides benefits that duplicate the vested retiree healthcare benefits, the modification cannot result in a reduction in benefits. The letter is evidence that the benefits can be improved but not reduced, and is therefore consistent with vesting.[11]

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[10] In a July 1998 newsletter Case announced "**Important Improvements to Your Health Care.**" Case stated that "union negotiators and Case management have worked together to advance your health care benefits" and that: "This newsletter focuses on improvements to your health care benefits" and describes the "improved managed care system" beginning September 1, 1998. Doc. 273-65 at 10753 to 10757 (Newsletter). In the second Benefit News for Case Union Employees, Case informed retirees about the "improved managed care health care system" effective September 1, 1998 and that "[y]our other benefits are also improving." Doc. 273-66 at 10758 to 10766 (Newsletter).

[11] CNH contends that it modified the benefits to the Class, unilaterally, by requiring Medicare-eligible Retirees to participate in the Medicare Part D prescription drug program effective in 2015. The Class disagrees with this characterization of the events, specifically that Part D created a duplicative benefit and that the National and State Health Insurance Initiatives letter applied. The Class did concede that the "current law of our case" allowed CNH to modify benefits to reduce plan costs so long as the benefits remained commensurate with the benefits provided under the current plan. Doc. 425-12 at 15179-15180. (Brault Letter).

B. Procedural history

This conflict began when CNH filed a declaratory action asserting that the retiree healthcare benefits promised to the Class were not vested.[12] In response, this action was properly filed,[13] seeking a declaratory judgment that the retiree healthcare benefits were vested.

1. Prior Proceedings

In 2007, the district court granted summary judgment to the Class and denied CNH's motions for summary judgment. After analyzing the language of the CBA and relevant extrinsic evidence, the district court concluded:

> [T]he plain language of the relevant agreements, as further supported by extrinsic evidence, demonstrates Case's and the UAW's intent to grant lifetime retiree health insurance coverage to retirees and surviving spouses of retirees who are eligible for or are receiving a pension.

Reese v. CNH Glob. N.V., No. 04-70592, 2007 WL 2484989, at *7 (E.D. Mich. Aug. 29, 2007).

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[12] *CNH Am. LLC v. UAW*, No. 04-C-0148, 2004 WL 5627648 (E.D. Wis. Aug. 3, 2004).

[13] The selection of venue was not based upon forum shopping, as CNH states, but rather, because a companion case, the *Yolton* matter, was pending before Judge Duggan in the Eastern District of Michigan and it was efficient for this matter, involving identical contracts, to be heard in the same Court.

CNH filed its ***first appeal***. On July 27, 2009, the Sixth Circuit affirmed that the retiree healthcare benefits vested for life. *Reese v. CNH America LLC*, 574 F.3d 315, 327 (6th Cir. 2009) (*Reese I*). After finding the benefits to be vested for life, Judge Sutton, who authored the opinion, then posed the question "[w]hat does vesting mean in this context?" Judge Sutton focused on the 1998 negotiations where Case and the UAW agreed to substitute the Case Managed Network Plan for the existing Indemnity Plan for active employees and the small group of existing retirees who had retired after July 1, 1994. Judge Sutton examined the 1998 CBA and, drawing all inferences in favor of CNH, cited selected extrinsic "clues" that *could* support an interpretation that the vested benefits of retirees could be "change[d] from CBA to CBA." 574 F.3d at 325. According to the court, any such modifications must be "reasonably commensurate" with the benefits provided in the 1998 CBA, "reasonable in light of change in health care" and "roughly consistent with the kinds of benefits provided to current employees." *Id.* at 326. The court remanded the case to "decide how and in what circumstances CNH may alter such benefits - and to decide whether it is a matter amenable to judgment as a matter of law or not." 574 F.3d at 327.

Plaintiffs filed a Petition for Panel Rehearing, arguing that the court had decided an issue – what vesting means in the context of the 1998 negotiations – that CNH had not raised either before the district court or on appeal. Plaintiffs also challenged the determination that there had been "material alterations" to health benefits for existing retirees in 1998, which was the predicate for this Court's conclusion that future changes could be made.

Plaintiffs cited record facts showing that the 1998 negotiations resulted in substantial *improvements* to the benefits provided for both existing and future retirees, noting that Judge Sutton had acknowledged that the *improvement* of benefits would not "break any promises to provide irreducible benefits for life." *Reese I*, at 325.

On September 24, 2009, the panel denied Plaintiffs' motion for reconsideration. Judge Sutton filed a published concurrence. *Reese v. CNH Am. LLC*, 583 F.3d 955 (6th Cir. 2009).[14] Judge Sutton instructed that, on remand, the parties were free to develop evidence that would show either 1) that "plaintiffs should win as a matter of law because the prior retirees either approved of the changes or they did not diminish the nature of the benefit package that existed upon retirement;" *or* 2) "that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language." *Id.*

On remand, Plaintiffs argued that the 1998 negotiations had improved (and had not diminished) retiree healthcare benefits and, therefore, Plaintiffs should, in Judge Sutton's words "win as a matter of law." Plaintiffs also argued that any future modifications to retiree healthcare benefits could only

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[14] Judge Sutton responded to Plaintiffs' protest of the court's assessment of the factual record, stating that it "overlooks the posture of the case - summary judgment - in which all inferences run in favor of the party that lost below: CNH." *Id.* at 956.

be made, as in the 1998 negotiations, by the agreement of CNH and the UAW, and not unilaterally.

The district court granted Plaintiffs' motions for summary judgment and denied CNH's motions. *Reese v. CNH Glob. N.V.*, No. 04-70592, 2011 WL 824585, at *10 (E.D. Mich. Mar. 3, 2011). After an extensive review of the evidence presented, the court held that the 1998 negotiations had resulted in *improved* healthcare benefits for existing retirees. The court concluded, viewing the record before it in a light most favorable to CNH, that there was "no evidence that the UAW and CNH (or Case previously) ever negotiated a *reduction* of those benefits." The district also concluded that, to the extent CNH can make future changes to retiree health care benefits, it may do so "only through an agreement with the UAW."

On March 16, 2011, CNH filed its ***second appeal***. On September 13, 2012, Judge Sutton again authored the opinion for the majority, *Reese v. CNH America LLC,* 694 F.3d 681 (6th Cir. 2012) (*Reese II*). Without mentioning the 2009 concurrence, Judge Sutton stated that the district court had "misread" *Reese I* and erred in addressing the issue of whether benefits had been improved or diminished in the 1998 negotiations. Instead, Judge Sutton stated that, in *Reese I*, the court "recognized that CNH could alter [benefits] on its own, not as part of a new collective-bargaining process," so long as the changes were "reasonable." The majority remanded the case to the district court for it to "take evidence on" several questions around the reasonableness of the proposed changes. *Reese II* at 684-686.

Plaintiffs and CNH filed cross motions for summary judgment on the issue of the reasonableness of the changes proposed by CNH. These motions were pending when this Court decided *Tackett*. CNH then filed a motion requesting summary judgment under *Tackett*.

2. District Court Proceedings

On September 28, 2015, Judge Duggan issued an opinion, holding that he was "constrained" by *Tackett* to enter summary judgment for CNH. Plaintiffs filed a Motion for Reconsideration, which the district court granted on November 9, 2015. Pet. App. 40. The court found that its earlier decision was hasty and failed to consider and apply ordinary contract principles, without inferences. Proper analysis resulted in a finding that the contract language was at least ambiguous and that the extrinsic evidence overwhelmingly supported a finding that the parties intended to vest the benefits. The district court again entered judgment in favor of the Class.

3. Circuit Court Proceedings

On November 10, 2015, CNH filed its **third appeal**. Judge Gibbons, writing for the majority, found that the retiree healthcare benefits promised to the Class were vested, lifetime benefits. Pet. App. 1. Judge Donald concurred in the vesting determination. Pet. App. 22. Judge Sutton dissented. CNH's Petition for En Banc Review was denied. Pet. App. 24.

The majority acknowledged that *Tackett* changed Sixth Circuit law when it abrogated the *Yard-Man*[15] inference in favor of "ordinary contract principles" when reviewing collective bargaining agreements. Judge Gibbons went on to consider which of the contract principles created by the *Yard-Man* line of cases impermissibly relied upon inferences. Pet. App. 7. The Sixth Circuit reviewed the surviving principles in the context of its decision in *Tackett III*, ultimately concluding that a case by case review of facts is needed to determine whether the presence of a durational clause cures ambiguity as to the duration of benefits or whether when read in conjunction with the whole instrument, ambiguity is furthered. Judge Gibbons wrote: "We cannot, and should not, presume that the general-durational clause here says everything about the parties' intentions." Pet. App. 11.

The Court below reconciled *Tackett*, noting "[t]here is surely a difference between finding ambiguity from silence and finding vesting from silence." Pet. App. 12. The Court recognized that the cardinal principle of contract interpretation is to ascertain the parties' intentions. While an inference forecloses that inquiry, finding ambiguity opens it. Giving dispositive weight to the general durational clause would create an opposite inference in favor of the employer, which *Tackett* does not permit. Pet. App. 12.

The Sixth Circuit applied *Tackett* and found that silence as to the duration of retiree healthcare benefits, combined with those benefits' coupling to pensioner status and their segregation from other entitlements in

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[15] *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

the CBA, overcomes any presumption that the general-durational clause should govern. To find otherwise would ignore evidence taken from the whole instrument, in contravention of ordinary contract principles, and in contravention of the most important of those – determining the parties' intent. Pet. App. 12-13.

After finding the contract to be ambiguous, the Sixth Circuit then examined the extrinsic evidence, which plainly indicates the parties intended to vest the benefits for life. Pet. Ap. 13. The district court was affirmed.

REASONS FOR DENYING THE PETITION

Less than three years ago, in *Tackett,* this Court directed courts to construe collectively bargained promises using "ordinary principles of contract law consistent with federal labor policy."

The Sixth Circuit applied those principles below, shorn of inference, to find for the third time that CNH promised vested, lifetime benefits to this class of retirees. The vesting question, on these facts, was correctly decided. The majority applied ordinary contract principles to find that the contract was ambiguous and that extrinsic evidence proved the parties' intent to contract for retiree healthcare benefits that were vested for life.

Fact-specific inquiries will naturally conclude differently, depending upon those facts. The Sixth Circuit decisions are the natural product of ordinary contract principles applied to varied and complex facts. There is no compelling reason for this Court to review them.

The Courts of Appeal are now directed through *Tackett* to apply ordinary contract principles and not to use inferences for or against vesting. CNH argues that there is an intra-circuit split, but it relies primarily on cases decided before *Tackett*. It is premature to conclude that the Courts of Appeal require guidance on how to apply *Tackett*. The two appellate cases decided in other Circuits, do not indicate a conflict.

A. The ordinary contract principles relied upon below to find, for the third time, that these benefits are vested are consistent with this Court's decision in *Tackett*.

This case was correctly decided. The Sixth Circuit accepted that *Tackett* abrogated the *Yard-Man* inference. The Court carefully examined the *Yard-Man* line of cases to determine what, if any, contract principles found in those cases impermissibly relied on an inference in favor of vesting.

The Sixth Circuit noted these ordinary principles of contract law which survived the abrogation of *Yard-Man*:

- [A]s with any other contract, the parties' intentions control.
- Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.
- Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove

> those customs or usages using affirmative evidentiary support in a given case.

Pet. App. 8-9, citing *Tackett III,* 811 F.3d at 208 (6th Cir. 2016) citing *Tackett*, 135 S. Ct. at 933-937.

The Sixth Circuit went on to acknowledge the principles highlighted in Justice Ginsberg's concurrence:

- Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.
- [W]hen the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties.... [F]or example, the parties' bargaining history.
- No rule requires "clear and express" language in order to show that parties intended health-care benefits to vest.
- Constraints upon the employer after the expiration date of a collective-bargaining agreement ... may be derived from the agreement's "explicit terms," but they may arise as well from implied terms of the expired agreement.

Pet. App. 9, citing *Tackett III* at 208–09, citing *Tackett*, 135 S. Ct. at 937–938 (Ginsburg, J., concurring)).

In *Tackett*, Justice Ginsberg also stated: "a provision stating that retirees 'will receive' health-care benefits if they are 'receiving a monthly pension' is relevant to [the vesting] examination." 135 S. Ct. at

938. Applying these principles to relevant evidence, the panel majority correctly found that the contract language is ambiguous.

Here, the parties used identical language to vest pension and healthcare benefits, knowing that the obligation to provide pension benefits would not end at the expiration of the agreement. Also, the retiree healthcare benefits provisions of the contract were set forth, fully, in a separate section, apart from the provisions applicable to benefits for current employees. Additionally, the contract carved out certain benefits and stated that those coverages ceased at a time different from the contract expiration.[16]

The Sixth Circuit concluded that a plausible reading of the contract language is that so long as a retiree is eligible for a pension (for life), he is eligible for retiree healthcare benefits without contribution.

Finding ambiguity on these facts does not offend the mandate that vesting not be inferred from silence because there is no inference. Rather, facts – without inference – supported a finding of ambiguity.

Tackett does not instruct that facts which formerly supported an inference are, post-Tackett, to be ignored.

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[16] The majority below did not discuss additional contract facts that support a finding of ambiguity: The caps letters. The parties understood the obligation to provide retiree healthcare benefits extended beyond the contract term. Otherwise, there would be no point in placing a contractual cap on that obligation or in removing an existing cap for these retirees. The decision below also did not address the latent ambiguities created when the parties incorporated exact language used from prior agreements. *UAW v. Kelsey-Hayes*, 854 F.3d 862 (2017).

Those facts can inform a finding of ambiguity. While unambiguous contract language is generally interpreted without resort to extrinsic evidence, it need not be interpreted in a vacuum; the underlying goal in interpreting a contract is to ascertain the intent of the parties, and the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent. II Williston on Contracts § 30:6 (4th ed.) (footnotes omitted) cited in *Tackett* at 933. Indeed, "[f]inding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended." Pet. App. 12.

CNH bases its appeal to this Court upon Judge Sutton's dissent. CNH and the dissent take an overly narrow view of the holding in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016), cert. denied 137 S. Ct. 375 (2016), one that would nullify the portion of *Tackett* that allows a finding of ambiguity despite the existence of a "general durational clause." CNH argues that rigid adherence to the principles expressed in *Tackett* require this Court to ignore the historical meaning of the language, the admissions of CNH regarding what the language means, the decades of conduct shaped by the promise, and the ambiguities of the contract. CNH would eschew all the record evidence, in favor of a requirement of "clear and express" vesting language, which it claims would change the benefits at issue here from being unambiguously "vested" to unambiguously "not vested."[17]

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[17] Here, the district court found, twice, that the benefits were unambiguously vested on the face of the contract. The Sixth Circuit affirmed that aspect of the trial court's decisions, twice.

Essentially, CNH argues that *Tackett* created a reverse *Yard-Man* presumption – that a general durational clause in a contract – regardless of the parties' intentions, precludes a finding of vesting. This position is contrary to the directive to analyze the vesting question without resort to inferences.

Ambiguity opens the analysis to extrinsic evidence of the parties' intent. Once extrinsic evidence is reached, there can be no doubt of the intentions of the parties. Here, the evidence is overwhelming and unequivocal that CNH intended to vest retiree healthcare benefits and CNH never attempts to argue otherwise. Instead, CNH wholly ignores the record evidence which indisputably demonstrates the parties' intent.

Vesting, here, is fully anchored in this Court's decision in *Tackett*. The danger of the *Yard-Man* inference was its dispositive resolution of the question of vesting without consideration of intent evidence. The lower court recognized the difference between "finding ambiguity from silence and finding vesting from silence" Pet. App. 11. The extrinsic evidence may show that the parties did not intend the benefits to vest. Or, as in this case, it could demonstrate that the rights had vested. Pet. App. 13-14. This fact-based analysis the Sixth Circuit employed is exactly what *Tackett* commands.

Post-*Tackett*, the district court reassessed as directed and found that, shorn of inferences, the contract language was ambiguous. The Sixth Circuit affirmed.

B. The array of decisions in the Sixth Circuit following *Tackett* are the natural result of the application of *Tackett* to complex and varied facts, not a failure to correctly apply *Tackett*.

CNH is wrong in asserting that there is a direct conflict within the Sixth Circuit. The differing facts in the post-*Tackett* cases are sufficient to explain the differing outcomes.

The Sixth Circuit's discussion of *Tackett* and *Tackett III* in *UAW v. Kelsey-Hayes Company*, 854 F.3d 862 (6th Cir. April 20, 2017) is consistent with the *Tackett* analysis. The *UAW v. Kelsey-Hayes* court concluded:

> ... overruling the *Yard-Man* inference did "not preclude the conclusion that the parties intended to vest lifetime benefits for retirees." The Court's language repeatedly emphasized that a court should look to ordinary contract interpretation, remove any thumb on the scale in either direction, and look to the intent of the parties in the instant case.
>
> On remand [in *Tackett III*], we noted a non-exhaustive list of contract principles to apply when interpreting the duration of healthcare benefits in a CBA. First and foremost, *Tackett III* emphasized that "[a]s with any other contract, the parties' intentions control." This was highlighted in particular by citing Justice Ginsburg's concurrence: "Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail."

Id. (citations omitted).

The Sixth Circuit reiterated the following from *Tackett III*:

> [W]hile the Supreme Court's decision [in Tackett] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits," we also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest.

Id. at 867 (quoting *Tackett III*, at 811 F.3d at 209).

Gallo recognized that ordinary principles of contract law did not require blind adherence to a termination date:

> *Tackett* does not create [a clear-statement rule]. It tells courts to apply "ordinary principles of contract law"—identifying relevant principles in this setting along the way—and tells courts to follow those principles where they lead. . . . In overruling *Yard-Man*, in short, *Tackett* does not create a clear-statement rule in the other direction. It instead eliminates the use of inferences and implications not grounded in "ordinary principles of contract law" and explains the kinds of tools properly deployed in this setting.

Gallo, 813 F.3d at 274 (citing *Tackett*, 135 S. Ct. at 933).

The *Gallo* panel's rejection of a clear-statement requirement is entirely consistent with the unanimous Sixth Circuit panel ruling in *Tackett III*, 811 F.3d 204, issued prior to the divided *Gallo* case. As in *Gallo*, the Sixth Circuit in *Tackett III* recognized that the Supreme Court "declined to adopt an 'explicit language' requirement in favor of companies:"

> [T]he Supreme Court's decision prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

811 F.3d at 209.

Although *Gallo* found the absence of contract language reflecting a commitment to "provide unalterable healthcare benefits to retirees and their spouses for life" to be a critical starting point, it did not hold that the absence of such specific language or the presence of a general durational clause was dispositive—such a holding would have been plainly at odds with *Tackett* and *Tackett III*. Rather, *Gallo* relied upon a number of other factors present in *Gallo* but absent in this case, and, moreover, made clear that its holding was specific to "this set of contracts." *Gallo*, 813 F.3d at 274.

In *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017) (*Cole II*), decided on the same day as the decision below, the Sixth Circuit determined that retiree healthcare

benefits were not vested. In that case, the collective bargaining agreement stated that the healthcare benefits would last "until the termination of the National Agreement." On its facts, the Court found this to be a clear statement that the general-durational clause was intended to govern retiree healthcare benefits, therefore tying a benefits promise to the receipt of a pension did not result in ambiguity.

In *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), the Sixth Circuit found ambiguity in the contract which provided for retiree healthcare "for life" and ultimately determined that the benefits were vested, distinguishing *Gallo* on its facts.

Petitions for en banc review were denied in the trio of retiree healthcare benefits cases decided on April 20, 2017. See *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388 (6th Cir. 2017). While positions varied as to the denial of en banc review, Judge Gibbons found that the differences in the Sixth Circuit decisions were borne of differences in fact. She also found that the only path to conflict is an overly restrictive reading of *Tackett*, using *Gallo* as an example. Judge Gibbons explained:

> If *Gallo* is regarded as simply another case whose resolution depended on examination of a factual record and application of old and tested contract construction principles, there is no conflict at all among our cases. The only tension arises from viewing *Gallo* as more than a factual precedent and making it a legal precedent for dissimilar cases. ... *Gallo* by its terms does not have the meaning suggested by the dissents in *Kelsey-Hayes* and *Reese* but is merely a case

> where the contract was unambiguous and did not vest benefits for life.

Kelsey-Hayes, 872 F.3d 388, 389 (6th Cir. 2017).

The Sixth Circuit is uniformly following *Tackett*, case by case. In *Watkins v. Honeywell Int'l Inc.*, No. 17-3032, 2017 WL 5163221, at *1 (6th Cir. Nov. 8, 2017), the Sixth Circuit found that this language: "For the duration of this Agreement, the Insurance Program shall be that which is attached hereto, hereinafter referred to as the Program," was not patently ambiguous.

In *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206 (6th Cir. Sept. 1, 2017) the Sixth Circuit explicated its new, post-*Tackett* approach to retiree healthcare benefits. It found that all of the contracts at issue therein contained unambiguous general-durational clauses that defeated vesting, specifically distinguishing the decision below based upon facts, at *5.

In *Watkins*, the Sixth Circuit also specifically distinguished this case based upon facts, 2017 WL 5163221 at *6. Judge Cole, writing for the unanimous panel, surveyed the decisions since *Tackett* and reconciled the holdings in *Gallo, Cole, Kelsye-Hayes,* and the decision below.

The district courts are following the Sixth Circuit's lead: *Zino v. Whirlpool Corp.*, No. 5:11CV1676, 2017 WL 3219830, at *5 (N.D. Ohio July 27, 2017), *Fletcher v. Honeywell Int'l, Inc*, No. 3:16-CV-302, 2016 WL 6780020, at *8 (S.D. Ohio Nov. 15, 2016), *Sloan v. Borgwarner, Inc.*, No. 09-CV-10918, 2016 WL 7107228, at *13 (E.D. Mich. Dec. 5, 2016), *Cole v. Arvin-Meritor,*

No. 03-73872, 2017 WL 5386598, at *3 (E.D. Mich. Nov. 14, 2017).

These individualized assessments are what *Tackett* requires. That the results are varied speaks to the differing fact patterns, not a pervasive misapplication of this Court's decision in *Tackett*.

C. There Is No Evident Conflict Among the Circuits.

In his dissent, Judge Sutton listed a number of cases for the proposition that there is an intra-circuit split of authority on the issue of vesting. CNH relies upon those cases in its petition. Pet. 18. Because all of those cases preceded this Court's decision in *Tackett*, it cannot be evidence of a split generated by *Tackett* or the Sixth Circuit's reading of *Tackett*. To the extent there was a pre-*Tackett* split, that issue was addressed by *Tackett*.

Since the decision in *Tackett* there have been only two vesting cases decided in circuits other than the Sixth citing *Tackett*: *Groves v. Johnson Controls, Inc.*, 694 Fed. Appx. 864 (3rd Cir. 2017) (unpublished) and *Barton v. Constellium Rolled Products-Ravenswood, LLC*, 856 F.3d 348 (4th Cir. 2017).[18]

In *Groves*, the Third Circuit considered whether it's previous rule requiring vesting to be "stated in clear and express language" survived this Court's decision in

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[18] The Seventh Circuit, in *dicta*, noted *Tackett* reset the law of the Circuit – that courts should not use a presumption for or against vesting. *Underwood v. City of Chicago, Ill.*, 779 F.3d 461, 462-463 (7th Cir. 2015).

Tackett, but reserved that question for the future.[19] It found, applying traditional rules, that a reservation of the right to adopt, modify or terminate benefits prevented vesting, despite language that the retiree healthcare benefits would be continued "until death." This decision is not in conflict with Sixth Circuit jurisprudence because a reservation of rights clause in the contractual document would, in the Sixth and likely every other Circuit, be unambiguous evidence that the benefits were not vested. Indeed, in *Gallo*, there was a similar "reservation-of-rights clause that evidenced an intent not to vest" at 270.

In *Barton*, the Fourth Circuit recognized an explicit durational clause in finding that the benefits were not vested under *Tackett*: "such benefits shall remain in effect for the term of this 2010 Labor Agreement" at 350. This finding is not in conflict with the Sixth Circuit fact-driven approach. Indeed, the operative facts and outcome are similar to those in *Cole II*, supra.

CNH contends that the decision below and in *Groves* and *Barton* constitute an intra-circuit split. The Class disagrees. These cases can be harmonized through fact analysis. That only two such cases have been decided indicates that even if there were a

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[19] CNH and proposed amici curiae have advocated below for a "clear and express" rule. However, such a rule is not supported by ordinary contract principles. Instead, it is a presumption in favor of employers and against vesting, contrary to the directive in *Tackett* to free the analysis of inferences and revert back to contract law. Based upon this Court's decision, the Circuit Courts of Appeal that previously relied upon such a rule will be required to revisit the analysis as the issues sharpen through real controversy and rise from the trial courts for appellate review.

conflict, that conflict has not matured into one that merits review.

CONCLUSION

CNH's petition for writ of a certiorari should be denied.

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No. 17-515

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA LLC

PETITIONERS,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

The Petition shows that the Sixth Circuit's decision in this case misinterpreted this Court's unanimous decision in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), resurrected a conflict among the circuits, and created a conflict within the Sixth Circuit itself. Moreover, as amici show, the decision sows uncertainty among employers and retirees alike about the duration of retiree health benefits, threatens to impose massive financial burdens on employers, and invites a return to forum shopping in the Sixth Circuit.[1]

In opposition, the Retirees urge the Court to look the other way. They contend that the decision, and the conflicts it has spawned, are explained by factual distinctions among retiree benefit cases. But this reading of the various decisions is demonstrably wrong. As the Chamber of Commerce explains, "the plan terms on which the majority relied are likely to recur in nearly every retiree-health-benefits case." Chamber Br. at 15. Even though the contract language in these cases is materially identical, certain panels, like the one here, are improperly divining ambiguities to "permit[]" and "allow[]" consideration of extrinsic evidence. Pet. App. 12. But turning to extrinsic evidence in the face of unambiguous general durational clauses flouts this Court's instruction in *Tackett* that enforcement of

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[1] *See* Brief of Amicus Curiae United States Chamber of Commerce, et al., at 5–7 & 12–14 ("Chamber Br."); Brief of Amicus Curiae ERISA Industry Committee, at 10–11 ("ERIC Br."); Brief for Amicus Curiae Whirlpool Corp., at 12 ("Whirlpool Br.").

"contractual 'provisions ... as written is *especially appropriate* when enforcing an ERISA [welfare benefits] plan.'" 135 S. Ct. at 933 (emphasis added).

Worse still, Retirees hail the decision below as inviting "a case by case review of facts to determine whether a durational clause cures ambiguity." Opp. at 13. An invitation to disregard the contractual language and consider extrinsic evidence will exacerbate uncertainty and make trials the norm in these disputes. That is not what Congress intended when it rejected mandatory vesting of welfare benefits, and it is not, CNH respectfully submits, what this Court intended in *Tackett*.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH *TACKETT*.

The Sixth Circuit's decision contravened *Tackett* in several ways. Pet. 14–17. It failed to follow the written agreement, which "is presumed to encompass the whole agreement of the parties." *Tackett*, 135 S. Ct. at 936. As in its pre-*Tackett* decisions based on *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), the lower court "refused to apply [the] general durational clause[] to provisions governing retiree benefits." 135 S. Ct. at 936. It compounded these errors by disregarding "the traditional principle that courts should not construe ambiguous writings to create lifetime promises," *id.*, and the canon that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life," *id.* at 937. Rather than construing the agreement, the court reached out for extrinsic evidence, which it asserted

"moves us closer to the ultimate goal ... [of] discovering the parties' true intentions." Pet. App. 12.

The lower court justified this departure from *Tackett* on the ground that the general durational clause in the CBA here is ambiguous. To find ambiguity, the court relied on both "silence" and the "tying" of eligibility for healthcare to eligibility for a pension, both of which this Court expressly rejected as grounds for vesting. *Tackett*, 135 S. Ct. at 934, 935. The lower court tried to distinguish between reliance on silence and tying to find *vesting*, versus reliance on those same canons to find *ambiguity*, but its reasoning does not withstand analysis. *See* Pet. at 15–16. "A forbidden inference cannot generate a plausible reading." Pet. App. 32 (Sutton, J., dissenting). Absent some provision in the contract addressing the duration of retiree benefits, the general durational clause means what it says and says what it means: the contract, and the benefits it promises, expire on a date certain. *See Tackett*, 135 S. Ct. at 937 ("traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.").

Remarkably, the Retirees make no attempt to reconcile the lower court's reasoning with the instructions in *Tackett*. They repeatedly argue that, under Sixth Circuit precedent, a durational clause does not say "everything" about the vesting of benefits, Opp. at 13, 21, 22; that extrinsic evidence itself can be used to show an ambiguity, *id.* at 18 ("those facts can inform a finding of ambiguity"); and that "[a]mbiguity opens the analysis to extrinsic

evidence of the parties' intent," *id.* at 19. They even claim that "[t]he danger of the *Yard-Man* inference" was its failure to "consider[] intent evidence." *Id.* at 19. Even in the *Yard-Man* era, the Sixth Circuit at least made a pretense, through illogical canons, of following the agreement.

For the Retirees, however, the written agreement is simply beside the point. The Retirees here would move forthwith to the extrinsic evidence both to find an ambiguity and to resolve it. Their approach flouts *Tackett*. 135 S. Ct. at 933 (when contact language is clear, "its meaning is to be ascertained in accordance with its plainly expressed intent.") (citation omitted); *id.* at 938 (Ginsburg, J., concurring) ("When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further.").

II. THE DECISION BELOW CREATES BOTH AN INTER-CIRCUIT AND AN INTRA-CIRCUIT CONFLICT.

A. The Petition explains how the decision creates and furthers an inter-circuit conflict, both with pre-*Tackett* decisions of other Courts of Appeals, *see* Pet. App. 27 (Sutton, J., dissenting), and with post-*Tackett* decisions of the Third and Fourth Circuits, Pet. at 20–24. The Retirees merely assert that the decisions are fully reconcilable on their facts. They are wrong.

The CBA in this case stated that the Group Benefit Plan, which contained the retiree health benefits, "will run concurrently with the [CBA],"

which expired on May 2, 2004. Pet. App. 114–15. The benefits at issue in both the Third Circuit and Fourth Circuit cases were likewise subject to durational clauses with language materially identical to the language here. *See Barton v. Constellium Rolled Products-Ravenwood*, 856 F.3d 348, 352 (4th Cir. 2017) ("Article 15 of the CBA states that the retiree health benefits 'shall remain in effect for the term of this ... Labor Agreement."); *Grove v. Johnson Controls, Inc.*, 694 F. App'x 864, 868 (3d Cir. 2017) ("The booklets containing the phrases in question were incorporated into collective bargaining agreements, and those agreements, of course, included durational clauses with exact expiration dates.").

The lower court also deemed it significant that the plan at issue here "carved out certain benefits" that "ceased at a time different than other provisions of the CBA." Pet. App. 11. Again, the Fourth Circuit rejected this same argument based on similar language. *Barton*, 856 F.3d at 355 (no vesting even though dependent coverage "'shall cancel on the dates such person is no longer an eligible dependent as defined *or upon your death*, whichever comes first.'").

Further, the Retirees contend that certain "cap letters"—eliminated in the 1998 CBA at issue here—indicate that their benefits were vested. But the Fourth Circuit ruled that similar "Cap Letters themselves undermine the notion that the retiree health benefits vested, for the Cap Letters indicate that the parties can *change* the benefits" by placing limits on them. *Barton*, 856 F.3d at 353. In short,

the Third and Fourth Circuit decisions are in irreconcilable conflict with the decision below in the interpretation of *Tackett* on substantively identical contract language.

B. Likewise for the conflict within the Sixth Circuit. The decisions in this case and *UAW v. Kelsey-Hayes*, 854 F.3d 862 (6th Cir.), *reh'g denied*, 872 F.3d 388 (6th Cir. 2017), on the one hand, and in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir.), *cert. denied*, 137 S. Ct. 375 (2016); *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir.), *cert. denied*, — S. Ct. —, 2017 WL 4168076 (Nov. 27, 2017); and more recently *Watkins v. Honeywell Int'l Inc.*, 875 F.3d 321 (6th Cir. 2017), on the other, are in irreconcilable conflict on the law.[2] As amicus Whirlpool Corp. points out, Whirlpool Br. at 16, "the rule of law applied in *Gallo* and *Cole* does not assign any weight to the 'factual differences'" deemed determinative in this case. Indeed, in *Gallo*, *Cole*, and *Watkins*,[3] the general durational clauses in the CBAs were materially indistinguishable from the clause here. *See Gallo*, 813 F.3d at 269 ("Present in each CBA, the *general durational clause supplied a concrete date of*

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[2] The *Cole* class of retirees agreed that the Sixth Circuit's law is in irreconcilable conflict. *See Cole v. Meritor, Inc.*, No. 17-413, Petition for Certiorari, (filed Sept. 15, 2017) & Pet'rs' Supp'l Br. (filed Sept. 27, 2017). On 27 November 2017, the Court denied the petition for certiorari in *Cole*, just as it had done in *Gallo*, 137 S. Ct. 375 (2016). CNH submits that *Gallo* and *Cole* were correctly decided.

[3] In *Watkins*, the Sixth Circuit tried to reconcile the inconsistent decisions, but its suggestion that the durational clauses in *Gallo*, *Cole*, and *Watkins* are different from the one here is, as shown in text, not accurate.

expiration after which either party could terminate the agreement.") (emphasis added); *Cole*, 855 F.3d at 699 ("This [Insurance] Agreement and [Insurance] Program ... shall continue in effect *until the termination of the Collective Bargaining Agreement of which this is a part.*") (emphasis added); *Watkins*, 875 F.3d at 322 ("*For the duration of this Agreement*, the Insurance Program shall be that which is attached hereto") (emphasis added). As *Gallo* held, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." 813 F.3d at 269.

The court in *Gallo*, *Cole*, and *Watkins* also addressed other benefit provisions with specific end dates, but unlike the lower court here found the retiree health benefits, which had no specific end date, were governed by the general durational clause. *See Gallo*, 813 F.3d at 271 ("The 2005 CBA, for example, says that 'Hospitalization, Surgical and Medical Benefits for terminated employees, including lay-off, will continue in effect for the duration of the month for which premiums have been paid.'"); *Cole*, 855 F.3d at 700 ("the plaintiffs point out that the CBAs 'set specific durational limits on continued healthcare for employees on layoff and leave—up to 24 months—but set no duration limits on retiree healthcare.'"); *Watkins*, 875 F.3d 321, at *6 ("that the agreement contemplates early benefits termination for active employees but not retirees does not make it ambiguous."). These other panels of the Sixth Circuit rejected the very argument accepted by the lower court here, which deemed these specific durational

clauses evidence of an ambiguity in the general durational clause.

In contrast to *Gallo*, *Cole*, and *Watkins*, but in line with this case, *Kelsey-Hayes* deemed ambiguous a general durational clause stating the Agreement "continued through February 2002," on the ground that certain benefits were limited to "periods less than life," other benefits had "specific-duration periods for life," but the CBA did not specify a duration for healthcare benefits. 854 F.3d at 867, 868. Thus, no consistent interpretation of *Tackett* can explain the disparate results in this case and in *Kelsey-Hayes*, compared to results in *Gallo*, *Cole*, and *Watkins*.

Nor does the purported "tying" of healthcare eligibility to pension eligibility distinguish this case from the inconsistent Sixth Circuit decisions. The eligibility language in this case states: "Employees who retire under the [CNH] Pension Plan for Hourly Paid Employees after 7/1/94 ... shall be eligible for the Group Benefits." Pet. at 3. *Gallo* and *Watkins* specifically rejected the argument that tying of eligibility for retiree healthcare to eligibility for a pension suggested vesting. *See Gallo*, 813 F.3d at 272 ("the CBAs simply state that those who are *eligible* for pensions are also *eligible* for health benefits."); *Watkins*, 875 F.3d 321 at *6 ("that the agreement tied eligibility for healthcare coverage to pension eligibility *does not*, for this particular contract, *raise an ambiguity about the duration of the healthcare benefits*") (emphasis added).

The Retirees' fallback suggestion that this Court should deny the petition to give the Sixth Circuit

more time to work out its differences is unpersuasive. Opp. at 26–27. First, the Sixth Circuit declined three times to resolve this conflict and appears to lack a cogent majority to do so. *See UAW v. Kelsey-Hayes*, 872 F.3d 388, 390 (6th Cir. 2017) (Sutton, concurring in denial of rehearing) ("real possibility that [the court] would not have nine votes" to resolve the conflict). Moreover, in view of the severe consequences detailed by amici to both businesses and retirees from the continued uncertainty, "[t]he value of additional intra-circuit debate seems ... far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994); *see* Chamber Br. at 7–10 (consequences of uncertainty to employers and employees).

In short, the Retirees' assertion that the Third Circuit's decision in *Grove* and the Fourth Circuit's decision in *Barton* are distinguishable on their facts is inaccurate. Likewise, the contractual provisions in *Gallo*, *Cole*, and *Watkins* are materially identical to the provisions in this case.[4] Judge Griffin was plainly correct in observing that the Sixth Circuit's "post-*Tackett* case law is a mess," and "these decisions are in irreconcilable conflict regarding how courts are to view durational clauses." *UAW v.*

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[4] As amicus ERIC forcefully argues, Br. at 21–22, this case may be a candidate for summary reversal with instructions to enter judgment for petitioner CNH. *See Amgen, Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam) (summarily vacating Ninth Circuit's second decision because it "did not correctly apply" this Court's decision in the first appeal).

Kelsey-Hayes, 872 F.3d at 390, 391 (Griffin, J., dissenting from denial of rehearing). That "mess" calls for this Court's prompt resolution.[5]

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[5] Plaintiffs seek to prove vesting with extrinsic evidence from the record in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455, 469 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006). *See* Opp. at 1–3. *Yolton*, which follows *Yard-Man*, addressed benefits for a class of persons who retired *before* July 1, 1994, and who derived their benefits under earlier agreements. *See* Pet. App. 34 (Sutton, J., dissenting) (extrinsic evidence "predates the relevant time period").

Unlike the pre-1994 agreements, the 1995 and 1998 agreements "reset" the benefits for *all post-1994 retirees*, explicitly extending and modifying those benefits. Pet. at 3, 17; *see also Reese v. CNH Am. LLC*, 574 F.3d 315, 324 (6th Cir. 2009) ("*Reese I*"). The existing retirees "saw their coverage downgraded in at least one respect" with the move to managed care. *Id.* at 325; *see also Reese v. CNH Am. LLC*, 694 F.3d 681, 684 (6th Cir. 2012) ("*Reese II*") (same). For this reason, the Retirees' reliance on extrinsic evidence prior to 1994 is irrelevant to the interpretation of the agreements at issue here. *See* Pet. App. 34 (Sutton, J., dissenting) ("No amount of parol evidence regarding prior agreements, including promises made to workers who retired in the 1970s and '80s, is probative of the meaning of a set of distinct promises made by a new corporate parent for the first time in 1995, and then in altered form in 1998.").

If, contrary to *Tackett*, extrinsic evidence were relevant, the most compelling evidence is that the parties in fact renegotiated the benefits for all post-1994 retirees in both the 1995 and 1998 collective bargaining cycles. *See also Reese I*, 574 F.3d at 323 (quoting Summary Plan Description allowing CNH to "amend[] or terminat[e]" the plans).

III. THIS CASE IS THE APPROPRIATE VEHICLE TO RESOLVE THE CONFLICTS.

As the Retirees repeatedly note, this case has been to the Sixth Circuit three times. *See, e.g.*, Opp. at 12, 14, 15. The first two decisions held the benefits vested under *Yard-Man*, and this third decision relies on *Yard-Man* rules to reaffirm those earlier vesting rulings. In any event, Retirees cannot deny that the record is fully developed.

The Retirees assert that "it is premature to conclude that the Courts of Appeal require guidance" on how to interpret and apply *Tackett*, Opp. at 15, and that the conflict has not yet "matured," *id.* at 26–27. But district courts in the Sixth Circuit are already struggling to interpret and follow the inconsistent precedents, Pet. at 24–25, and the business community already confronts the uncertainty of inconsistent decisions as well as the risk of forum shopping. Chamber Br. 5–7 & 12–14; ERIC Br. 10–11; Whirlpool Br. 12. Moreover, if the Retirees are correct that the Sixth Circuit is demanding detailed analysis of extrinsic evidence in every case to determine if an ambiguity exists, and then resorting to such evidence to resolve the inevitable ambiguities discerned, the especial importance of written benefit plans is being completely undermined in the Sixth Circuit.

CONCLUSION

For the reasons set forth above, and in the Petition and amicus briefs, CNH Industrial N.V. and CNH Industrial America LLC urge the Court to grant the petition and summarily reverse the decision below, or in the alternative, to grant the petition and schedule this case for full briefing and argument.

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IN THE

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CNH INDUSTRIAL N.V., ET AL.,
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v.

JACK REESE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN BENEFITS COUNCIL, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), American Benefits Council (the "Council"), and the Business Roundtable move this Court for leave to file the attached brief in support of Petitioners.

All parties were timely notified of *amici*'s intent to file the attached brief as required by Rule 37.2(a). Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs with the Clerk. Respondents, however, declined to consent to this filing.

In this case, the Sixth Circuit declined to adhere to the ordinary principles of contract interpretation this Court previously held should apply to determine whether retiree health benefits are vested. In so doing, the Sixth Circuit created an intra- and inter-circuit split and introduced untenable confusion into the law of retiree health benefits. If let stand, the Sixth Circuit's decision will make it impossible for employers and employees to meaningfully bargain or reliably plan for the future. Employers and retirees will both suffer as a result. The rule of law will suffer, too, as the Sixth Circuit's outlier rule will create strong incentives for forum shopping.

As described more fully in the accompanying brief, *amici* are four organizations whose members are deeply interested in the subject matter of this petition. *Amici*'s members have experience with both collectively bargained and non-collectively bargained

benefit plans across different industries, locations, and time periods. Retiree healthcare benefits are an important part of those plans and are often a major expense to employers. It is important to *amici*'s members that clear legal standards govern contractual provisions for such benefits. The Sixth Circuit's decision, if left in place, could disrupt the provision of retiree health benefits nationwide, which could have serious adverse effects for *amici*'s members.

Amici can thus bring an important perspective to the issues before this Court. Accordingly, *amici* respectfully request that leave to file the attached brief in support of the petition for certiorari be granted.

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.7 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in this case received notice of the intention to file this brief at least 10 days before its due date. Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs with the Clerk, and Respondents declined to consent to *amici*'s filing.

regularly files amicus briefs in cases that raise issues important to manufacturers.

American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The Business Roundtable is an association of chief executive officers who collectively manage more than 16 million employees and $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as amicus curiae in a variety of contexts where important business interests are at stake.

Amici have a strong interest in the outcome of this case. *Amici*'s members have experience with both collectively bargained and non-collectively bargained benefit plans across different industries, locations, and time periods. Retiree healthcare benefits are an important part of those plans and are often a major expense to the employer. It is important to *amici*'s members that clear and reliable legal standards govern contractual provisions for such benefits. Moreover, the decision of the U.S.

Court of Appeals for the Sixth Circuit in this case, if left in place, has the potential to disrupt the provision of retiree health benefits nationwide.

INTRODUCTION

This case implicates an issue of extraordinary importance to the nation's business community and workforce: retiree health benefits. In *M&G Polymers USA LLC v. Tackett*, 135 S. Ct. 926 (2015), this Court attempted to bring much-needed clarity and uniformity to the interpretation of retiree health-benefit plans by unanimously rejecting the Sixth Circuit's *Yard-Man* rule, which had improperly "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Id.* at 935 (discussing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). Just two years later, the Sixth Circuit—in the decision below and a companion opinion issued the same day—has reintroduced untenable confusion and conflict in this area of law. In effect, it is *Yard-Man* all over again.

Employers and employees cannot meaningfully bargain or reliably plan for the future in the chaotic legal landscape the Sixth Circuit has created. The massive unexpected costs and unpredictable benefits packages that will result (and, indeed, have already resulted) hurt employers and retirees alike. Flexible benefits packages are, more and more, an attractive option for both sides, as they allow leeway to accommodate changing regulatory regimes and medical technology. And the Sixth Circuit's effective presumption in favor of vested, frozen-in-time benefits makes it more difficult for parties to achieve the flexibility they intended. Moreover, the Sixth Circuit's outlier rule will undoubtedly result in large-scale forum shopping.

This case is a good vehicle for taking up the question presented and restoring the stability *Tackett*

had created. The Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION RE-INTRODUCED CONFUSION AND CONFLICT INTO THE LAW OF RETIREE HEALTH BENEFITS.

1. *Tackett* held that ordinary principles of contract interpretation govern the question whether collective bargaining agreements and associated benefit plans provide for vested, lifetime benefits. *See* 135 S. Ct. at 930. That ruling reinforced the status quo in all circuits save the Sixth, which had previously applied an interpretive methodology specific to retiree health benefits—the *Yard-Man* presumption—wherein vesting of benefits was presumed absent express indications to the contrary. *Id.* at 935. "A contract [that] is silent as to the duration of retiree benefits," the Court explained, cannot be construed as promising vested benefits for life. *Id.* at 937. Moreover, the Court made clear that the use of the future tense, without more, does not indicate an intent to vest. *See id.* And it specifically rejected the notion "that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits." *Id.*

2. The Sixth Circuit at first seemed to have learned its lesson, applying these principles faithfully in *Gallo v. Moen, Inc.*, 813 F.3d 265 (6th Cir. 2016). But on April 20, 2017, the Sixth Circuit simultaneously issued three retiree-health-benefit opinions, of which only one, *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), applied anything like the

interpretive principles *Tackett* endorsed. In the other two decisions—the decision below and *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017)—the Sixth Circuit reverted to the days of *Yard-Man* by jettisoning the ordinary principles of contract interpretation in favor of an *ad hoc*, retiree-health-benefit-specific methodology that once again makes vesting the default rule in all but name. The court, in Judge Sutton's words, thereby "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court [had] just sutured shut." Pet. App. 28 (Sutton, J., dissenting).

Of course, "[a]n intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en banc review." *UAW v. Kelsey-Hayes Co.*, No. 15-2285, slip op. at 4 (6th Cir., Sept. 22, 2017) (Sutton, J., concurring in denial of rehearing). But the Sixth Circuit declined to take that course—at least in part because there appears to exist no majority to support any outcome. *See id.*

3. The unclear and internally contradictory principles embraced by the majority below—particularly in conjunction with the other opinions issued the same day—have deeply unsettled retiree health benefits nationwide. As Petitioners explain at length, the Sixth Circuit's "post-*Tackett* case law is a mess," and the decision below is "in irreconcilable conflict" with other Sixth Circuit decisions, other circuits' jurisprudence, and *Tackett* itself. *Kelsey-Hayes*, No. 15-2285, slip op. at 5, 6 (Griffin, J. dissenting from denial of rehearing); *see* Pet. 12–25. As a result, neither employers nor retirees can predict the outcome of future cases, leaving retiree

health benefits in a state of limbo that—given the Sixth Circuit's apparent inability to course correct—only this Court can redress.

II. THIS CONFUSION AND CONFLICT WILL HURT EMPLOYERS AND RETIREES ALIKE.

Unless this Court intervenes, the confusion and conflict created by the decision below will wreak havoc for entities and individuals on both sides of the benefits bargaining table. These consequences will be particularly severe with respect to companies that operate across multiple jurisdictions.

1. On the employers' side, interpreting a collective bargaining agreement or benefits plan to provide for vested, lifetime benefits when the parties did not actually agree to that result imposes a massive and unanticipated financial burden. The costs—for which employers neither bargained nor would rationally have prepared—can easily exceed hundreds of millions of dollars. *See, e.g., Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 429 (6th Cir. 2010) (CEO testified that vested retiree health liabilities "could have bankrupted the company by rendering it unable to obtain capital"). Those numbers will only continue to rise as the population of retirees grows and the costs of healthcare increase. *See* 2010 Census Briefs, *The Older Population: 2010*, https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf (finding that "more people were 65 years and over in 2010 than in any previous census" and that "the population 65 years and over [has] increased at a faster rate (15.1 percent) than the total U.S. population (9.7 percent)"); PricewaterhouseCoopers,

Medical Cost Trend: Behind the Numbers 2018, https://www.pwc.com/us/en/health-industries/health-research-institute/behind-the-numbers/reports/hri-behind-the-numbers-2018.pdf (highlighting long-term trend of rising healthcare costs and explaining that "growth in employer premiums is still outpacing wage growth, making benefit costs unsustainable in the long run").

These costs affect not only companies' cashflow, but also their balance sheets. Employers, after all, are required to "reflect on their balance sheets the present value of the estimated future costs for retirees' medical benefits." *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 932 (5th Cir. 1993). Merely calculating such liability with any degree of certainty will be extraordinarily difficult in light of the Sixth Circuit's muddled jurisprudence. Moreover, if companies must assume the Sixth Circuit's effective presumption in favor of vesting will apply, the consequences to their books could be massive. *See, e.g., UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *3 (E.D. Mich. Mar. 31, 2006) (noting that, in 2004, General Motors reported $77 billion of "Accumulated Projected Benefit Obligations," of which $61 billion was attributable to union retirees).

Those numbers matter. In particular, booking significant retiree health insurance liability hurts companies' credit and market value. *See, e.g., Int'l Union, UAW v. Chrysler LLC*, No. 07-CV-14310, 2008 WL 2980046, at *5-*6 (E.D. Mich. July 31, 2008) (finding that Chrysler's obligations to pay retiree health benefits "adversely affect[ed] [its] creditworthiness" and "limit[ed] the company's access

to unsecured capital resources, substantially contributing to [its] precarious financial condition").

2. Lack of predictability will hurt retirees and current employees, too. Retirees, for their part, stand to lose all or most of their benefits if unanticipated retiree healthcare costs force their former employers out of business. *See Wood*, 607 F.3d at 429 (citing testimony that deeming retiree health benefits to be vested for life could be bankrupting).

Current employees, in the short term, may face lowered wages, lost hours, or even termination, as companies are forced to cut costs to pay for unanticipated healthcare costs. *See* U.S. Social Security Administration, *The Unsustainable Cost of Health Care*, p. 9 (September 2009), http://purl.access.gpo.gov/GPO/LPS118647 ("In the long run, most of the impact of rising health care costs on employers can be shifted to their workers by reducing wage growth, hiring fewer workers, or hiring more part-time workers who are typically not eligible for health insurance coverage."). In the long term, current employees may not even be offered retiree health benefits, as employers will be less willing to provide such benefits if the governing contract terms can be judicially expanded. *Cf. Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created."). That result would undermine one of ERISA's primary purposes—*i.e.*, to "induc[e] employers to offer benefits by assuring a *predictable* set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (emphasis added).

3. Companies that operate across multiple jurisdictions, and employees and retirees thereof, will be hit the hardest. That is because the Sixth Circuit's divergence from its sister circuits could yield "a patchwork of different interpretations of a [single] plan"—with benefits deemed vested for life in one jurisdiction and subject to modification in others. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Such inconsistent plan interpretation "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Id.*

III. FLEXIBILITY IN RETIREE HEALTH BENEFITS SERVES BOTH COMPANIES AND EMPLOYEES.

The Sixth Circuit's reversion to *Yard-Man* makes it more difficult for companies and employees to choose flexible health-benefit plans that, very often, maximize utility for all involved.

1. It perhaps goes without saying that healthcare and health insurance are subject to a complex and ever-changing regulatory regime. The Patient Protection and Affordable Care Act, 124 Stat. 119, for example, radically reshaped the health insurance market after "a long history of failed health insurance reform." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Further regulatory evolution, in one form or another, appears all but inevitable. *See, e.g.*, Shelby Livingston, *Insurers Won't Commit to 2018 Exchanges Until They Know ACA's Future*, MODERN HEALTHCARE, *available at*

http://www.modernhealthcare.com/article/20170203/NEWS/170209984 (Feb. 3, 2017) (noting that even health insurers lack "an inkling of what the future holds for the health insurance landscape").

2. At the same time, there continues to be "remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs." *Reese v. CNH Am. LLC*, 694 F.3d 681, 683 (6th Cir. 2012). But these advancements often come at a cost, with new and improved treatment options offered at higher prices than old ones. *See* Institute of Medicine and National Research Council, MEDICAL INNOVATION IN THE CHANGING HEALTHCARE MARKETPLACE 15 (2002), *available at* https://www.nap.edu/read/10358/chapter/5 (finding that "technological change has been the largest single driver of growth in health care spending over the past 50 years"); Merrill Goozner, *High-Tech Medicine Contributes to High-Cost Health Care*, Kaiser Health News, https://khn.org/news/ft-health-care-high-tech-costs (Feb. 15, 2010) ("The U.S. leads the world in creating state-of-the-art diagnostic and therapeutic treatments with the potential to work miracles in millions of patients. But the miracles come at a stiff price.").

3. The combination of these factors—complex regulatory change and scientific advancement—means that decades-old benefits packages may be ill-suited to employers' or retirees' needs. Companies, on the one hand, "want the freedom to change health-insurance plans" to account for new regulatory strictures and coverage options, as well as changed cost considerations. *Reese*, 694 F.3d at 684. Retirees, on the other, "want coverage to account for new and

better, yet likely more expensive, procedures and medications than the ones in existence at retirement." *Id.*

The unsurprising result of these aligned interests has been a nationwide trend away from vested, "one size fits all" benefit plans and toward more individualized and flexible retiree health coverage—including through plans offered through private exchanges. *See, e.g.*, Frank McArdle et al., *Retiree Health Benefits at the Crossroads*, http://goo.gl/HXZt5z (Apr. 14, 2014). These kinds of arrangements can maximize utility for both sides, allowing the parties to account both for changing regulatory environments and for changing health technology.

4. The confusion sown by the decision below threatens to impose a rigid, frozen-in-time benefits regime on parties who thought they had agreed to a more flexible one. Indeed, when ordinary principles of contract interpretation are cast aside and "silence" creates sufficient ambiguity to find vesting, Pet. App. 12, confusion is the inevitable result.

IV. THE SIXTH CIRCUIT'S DECISION CREATES STRONG INCENTIVES FOR FORUM SHOPPING.

If all of that were not bad enough, the circuit split created by the decision below will invite forum shopping, creating incentives for retirees and unions nationwide to bring their claims to the Sixth Circuit.

1. This Court has consistently recognized, in myriad contexts, that forum shopping is a serious threat to the rule of law. *See, e.g., Williams-Yulee v.*

Florida Bar, 135 S. Ct. 1656, 1672 (2015) (rejecting a judicial recusal rule "that would enable transparent forum shopping"); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("The federal limitations prescription governing copyright suits serves . . . to prevent the forum shopping . . . ."); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) (explaining that federal venue statute "should not create or multiply opportunities for forum shopping"); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (characterizing "discouragement of forum-shopping" as one of "the twin aims of the Erie rule").

2. Forum shopping is especially problematic in this context, as liberal venue provisions afford retirees and unions significant flexibility to seek out favorable forums in disputes about retiree health benefits. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (granting venue "in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"); ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (granting venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

3. That flexibility made the Sixth Circuit a magnet for retiree-health-benefit litigation during the *Yard-Man* era. *Cf., e.g.*, Jeffrey S. Klein & Nicholas J. Pappas, *Recent Developments in Retiree Health Benefits Litigation*, N.Y.L.J., June 5, 2006, at 3 (noting that, during the *Yard-Man* period, vesting cases were dependent not only on the facts of the case "but also on the governing judicial precedent in the jurisdiction where the case [was] filed"); Michael S.

Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 161 (1993) (highlighting possibility of races to the courthouse across different jurisdictions). In this very case, for example, the retirees sued in the Eastern District of Michigan notwithstanding that CNH had no employees or facilities within the Sixth Circuit. Pet. 25. The reason is not difficult to surmise: The retirees, like those in myriad other retiree-benefit cases, preferred the Sixth Circuit's "thumb on the scale" approach to the neutral, contract-based approach applied in other circuits.

4. In *Tackett*, the Court attempted to put an end to forum shopping in this area by restoring a single, predictable rule of law for retiree health benefits. But the Sixth Circuit has again created a circuit split. *See* Pet. App. 36 (Sutton, J., dissenting) (lamenting that the Sixth Circuit is now, "again, . . . out of step" with its sister circuits). Left uncorrected, the second *Yard-Man* era heralded in by the decision below will undoubtedly return the Sixth Circuit to its former status of "venue of choice" for retirees and unions seeking the benefit of a more favorable bargain than the one they actually struck.

V. THIS CASE IS A GOOD VEHICLE.

This case is an ideal vehicle for addressing these issues. There are no apparent vehicle flaws, the decision below turned on broad legal principles rather than on arcane plan terms, and granting this petition would allow the Court to resolve this issue before the end of this Term.

1. The petition has no apparent vehicle flaws. It squarely raises the question presented on a full and unusually well-developed record. *See* Pet. 25–26.

2. The majority's decision rests on sweeping pronouncements of law that are irreconcilable with *Tackett* and the law of other circuits. Not least, the majority held that courts may find ambiguity (1) from "silence" alone, Pet. App. 12, (2) from the mere fact that benefits are provided "past the date of retirement," *id.*, and (3) from "pension tying," *id.* at 13. These broadly applicable principles—rather than any unique facets of the agreements at issue—controlled the outcome of the case below.

Moreover, the plan terms on which the majority relied are likely to recur in nearly every retiree-health-benefits case. Benefits will be provided "past the date of retirement," Pet. App. 11, by definition, in literally every such case. Recent decisions from this Court and the Sixth Circuit make clear that "pension tying"—*i.e.*, conditioning eligibility for health benefits on eligibility for a pension—is very common, too. *See, e.g.*, *Tackett*, 135 S. Ct. at 937 (citing tying language in the agreements at issue); *Gallo v. Moen Inc.*, 813 F.3d 265, 272 (6th Cir. 2016) (same); *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206, at *8 (6th Cir. Sept. 1, 2017) (same).

3. Furthermore, this petition is on track to be considered and decided this Term. And the importance of quickly clearing up this confusion can hardly be overstated. Waiting an additional year would impose further uncertainty costs on employers and employees. It would also create massive inefficiencies for lower courts.

Indeed, there are multiple cases currently pending in the Sixth Circuit alone (including *Tackett* itself) that present the question whether retiree healthcare benefits are vested for life—some of which have already been up and down on appeal in the wake of *Tackett*. *See, e.g.*, *Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204 (6th Cir. 2016) (remanding to the district court for further proceedings after this Court's decision); *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017) (remanding for further proceedings); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15-CV-2301, 2017 WL 3219728 (N.D. Ohio July 28, 2017) (appeal pending); *Zino v. Whirlpool Corp.*, No. 5:11-CV-1676, 2017 WL 3219830, at *4 (N.D. Ohio July 27, 2017) (appeal pending); *Fletcher v. Honeywell Int'l, Inc.*, 238 F. Supp. 3d 992 (S.D. Ohio 2017) (appeal pending); *Cooper v. Honeywell Int'l, Inc.*, No. 1:16-CV-471, 2017 WL 213997 (W.D. Mich. Jan. 6, 2017) (appeal pending); *Watkins v. Honeywell Int'l, Inc.*, No. 3:16-CV-01925, 2016 WL 7325161 (N.D. Ohio Dec. 16, 2016) (appeal pending); *Kerns v. Caterpillar Inc.*, 144 F. Supp. 3d 963 (M.D. Tenn. 2015) (further district court proceedings pending).

In each of these cases, lower courts would benefit from prompt guidance. There is simply no reason to require courts to attempt to apply the Sixth Circuit's tangled jurisprudence and undergo yet another round of rebriefing and appeals in the event that the Court delays a year or more before taking up this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC,

Petitioners,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, the ERISA Industry Committee ("ERIC") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioners. All parties were timely notified of ERIC's intent to file an *amicus curiae* brief. Counsel for petitioners consented to the filing and stated that a letter of blanket consent to all *amicus* briefs is on file with the Clerk of this Court. Counsel for respondents did not consent to ERIC's filing of an *amicus* brief, therefore making this motion necessary.

ERIC is a nonprofit organization representing many large sponsors of ERISA-covered healthcare and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC is interested in ensuring that employee benefits plans are governed by clear, predictable rules, and it often participates as *amicus curiae* in cases that may impact employee benefits plan design or administration.[1]

ERIC has collective experience not shared by the parties, including experience regarding the considerations surrounding employee benefits plans. The arguments in this brief are intended to shed light

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[1] *See, e.g.*, *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015); *Conkright v. Frommert*, 559 U.S. 506 (2010); *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

on the question presented in ways additional to the detail already provided by petitioners' advocacy. Because ERIC believes that the attached brief would assist the Court in resolution of this case, it asks that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

ERIC is a nonprofit organization representing the Nation's largest sponsors of ERISA-covered pension, healthcare, disability, and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC often participates as *amicus curiae* in cases that may impact employee benefits plan design or administration.

Amicus seeks to ensure that voluntary employee benefits plans remain a workable feature of the American employment landscape. It advocates for policies that allow its members to offer benefits effectively, efficiently, and uniformly across the country. Here, *amicus* and its members have an interest in ensuring that collectively bargained retiree healthcare benefits are governed by predictable and uniform legal principles. Because the decision below conflicts with those of other Courts of Appeals, with other decisions within the Sixth Circuit, and with this Court's prior decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015), *amicus* has an interest in obtaining this Court's review to restore uniformity in the law. In addition, *amicus* has an interest in ensuring that employers' retiree healthcare obligations are enforced consistently with the text of the agreements in which those benefits are offered, and that employer obligations are not

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

unpredictably expanded in ways that increase the risks of agreeing to such benefits in the first place.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari and summarily reverse the decision below. That decision misapplies the rules of contract interpretation this Court set forth in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015), re-opens the circuit split that case tried to "suture[] shut," *Reese v. CNH Indus., N.V.*, 854 F.3d 877, 890 (6th Cir. 2017) (Sutton, J., dissenting), and forms part of a series of Sixth Circuit cases judges on that court now admit are "in irreconcilable conflict." *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 390–91 (6th Cir. 2017) (Griffin, J., dissenting from denial of rehearing en banc). Because the Sixth Circuit, by repeatedly denying requests for en banc review, appears unwilling or unable to bring its cases into conformity with this Court's precedent, and because the Sixth Circuit has an outsized impact on this important area of federal law, the question presented requires this Court's review.

Just over three years ago, this Court granted certiorari to resolve a circuit split regarding the interpretative rules that should apply in determining whether retiree healthcare benefits vest for life under a collective bargaining agreement. *See M&G Polymers USA, LLC v. Tackett*, 134 S. Ct. 2136 (2014) (granting certiorari in part). The Sixth Circuit, in a series of cases starting with *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (1983), had adopted a number of special inferences that tended to imply lifetime healthcare benefits when the contract on its face made no such

promise. Those so-called "*Yard-Man* inferences" were not applied by any other Court of Appeals. Resolving that circuit conflict presented an important issue of federal law, given Congress's longstanding "policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962).

In *Tackett*, this Court unanimously "reject[ed] the *Yard-Man* inferences as inconsistent with ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937. Emphasizing "the rule that contractual provisions ordinarily should be enforced as written," the Court abrogated the various rules of construction the Sixth Circuit routinely had used to imply vested benefits. *Id.* at 933, 937 (internal quotation marks omitted). The Court also set forth a number of "traditional principles" of contract law for courts to apply in determining the duration of retiree healthcare benefits, including that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement," *id.* at 937, and that "courts should not construe ambiguous writings to create lifetime promises," *id.* at 936.

Tackett should have ended this case. Despite the Court's clarity, it did not. In the decision below, the Sixth Circuit resurrected the *Yard-Man* inferences, using them to find that a collective bargaining agreement was ambiguous with respect to the duration of retiree healthcare benefits. *Reese*, 854 F.3d at 882–83. The Sixth Circuit then resolved that purported ambiguity in favor of lifetime vesting—just as it did in *Yard-Man* itself. *Id.* at 883.

That decision merits review, and summary reversal, for at least two reasons.

First, the Sixth Circuit's decision revives the untenable uncertainty and circuit conflict that prompted review in *Tackett*. It "abrad[es] an inter-circuit split," *id.* at 890 (Sutton, J., dissenting), as "every other court in the country would [have] handle[d] this case differently," *id.* at 893 (describing the Circuit split). In addition, the decision below furthers an intractable *intra*-circuit split. Some Sixth Circuit cases have faithfully followed *Tackett*. *See Gallo v. Moen Inc.*, 813 F.3d 265, 267 (6th Cir. 2016); *Cole v. Meritor, Inc.*, 855 F.3d 695, 699 (6th Cir. 2017). Others, such as the decision below, have sought to resuscitate the *Yard-Man* inferences and perpetuate a regime in which the Sixth Circuit's approach to these cases is badly "out of step" with those of other circuits. *See Reese*, 854 F.3d at 882–83, 893; *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862, 868–71 (6th Cir. 2017). The result is "a mess" of cases in "irreconcilable conflict." *Kelsey-Hayes*, 872 F.3d at 390–91 (Griffin, J., dissenting from denial of rehearing en banc). Because forum shopping and the Sixth Circuit's geography lead to "numerous retiree healthcare cases within [its] jurisdiction," *id.* at 392, this intra-circuit uncertainty assumes outsized significance.

Employers struggling to understand the scope of their obligations, moreover, have little hope that the Sixth Circuit will fix these problems on its own. Three of the Sixth Circuit's contradictory decisions were released on the *same day* "by cooperation of all three panels." *Id.* at 388 (Gibbons, J., concurring in denial of rehearing en banc). Parties in all three cases petitioned for rehearing en banc. All three petitions

were denied. Concurring in one denial, Judge Sutton explained that despite the fact that "[b]y nearly every measure, this case deserves en banc review," such review would likely be fruitless, as "there is good reason to fear that a majority of the en banc court would fail to agree on a majority view." *Id.* at 389–90. Absent action by this Court, therefore, the uncertainties created by the Sixth Circuit will persist indefinitely.

Second, the Sixth Circuit's decision below is plainly incorrect under *Tackett*. The collective bargaining agreements in this case never promised that retiree healthcare benefits would be provided for life. To the contrary, each contract contained a durational clause that limited all benefits in the contract (not otherwise extended or shortened) to the term of the agreement. Because nothing in the retiree healthcare provisions of this contract suggested that those benefits were subject to a different time limit, the durational clause controlled and the company's obligation to provide retiree healthcare benefits expired when the contract expired.

The Sixth Circuit reached a contrary conclusion only by applying the same *Yard-Man* inferences this Court previously rejected. It refused to apply the general durational clause to retiree healthcare benefits, *Reese*, 854 F.3d at 882, an approach *Tackett* rejected as "distort[ing] the text of the agreement" and "conflict[ing] with ordinary principles of contract law," 135 S. Ct. at 936. It also found that purported "silence" in the contract as to the duration of retiree healthcare benefits "further[ed]" ambiguity, *Reese*, 854 F.3d at 882, despite *Tackett*'s clear instruction that "when a contract is silent as to the duration of

retiree benefits, a court *may not* infer that the parties intended those benefits to vest for life," 135 S. Ct. at 937 (emphasis added). And it relied on the fact that "healthcare benefits were tied to pension eligibility," *Reese*, 854 F.3d at 882–83, even though *Tackett* rejected that same logic as one of several ways in which "*Yard-Man* and its progeny affected the outcome" in that case, 135 S. Ct. at 937.

This Court should therefore grant the petition and summarily reverse the decision below. Such review is needed to bring certainty to an area of law critical to employers and retirees, both in and apart from the Sixth Circuit, and to enforce *Tackett*'s clear command that collective bargaining agreements be read according to "ordinary principles of contract law," 135 S. Ct. at 937.

ARGUMENT

I. The Sixth Circuit's post-*Tackett* Case Law Has Created Uncertainty Regarding the Vesting of Collectively Bargained Retiree Healthcare Benefits.

A. The Interpretation of Collectively Bargained Retiree Healthcare Plans is an Issue of Great Importance to the Nation's Employers.

Retiree healthcare plans remain highly significant for many large employers. A recent survey of the Kaiser Family Foundation found that approximately 25% of employers with 200 or more employees offer some form of retiree health benefits.[2] While public-

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[2] See *2017 Employer Health Benefits Survey*, KAISER FAMILY FOUND. AND HEALTH RESEARCH & EDUC. TRUST, at 173,

sector and non-profit employers are most likely to offer benefits, 11% of large for-profit enterprises also do so, and retiree benefits grow more common with workforce size and union participation.[3] Indeed, employers provide collectively bargained retiree healthcare benefits to millions of people each year.[4] These employers include numerous well-known companies with large workforces, including Caterpillar, Whirlpool, General Electric, and many others.[5]

Covering so many employees is an increasingly expensive endeavor. Rising costs are partly attributable to the fact that the United States is an aging country. While 9.8 percent of our population was over age 65 in 1970, that figure reached 13 percent in 2010, and will exceed 20 percent by 2030.[6] Over 43 million Americans were over 65 years old in

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http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017.

[3] *Id.*

[4] *See* Anthony Caruso, *Statistics of U.S. Business Employment and Payroll Summary: 2012*, U.S. CENSUS BUREAU, at 1 (Feb. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf (noting that 59.9 million people worked in private sector companies with 500+ employees in 2012).

[5] *See, e.g.*, *Kerns v. Caterpillar Inc.*, 144 F. Supp. 3d 963, 965 (M.D. Tenn. 2015); *Zino v. Whirlpool Corp.*, 47 F. Supp. 3d 561, 565 (N.D. Ohio 2014); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15CV2301, 2017 WL [illegible] at *3 (N.D. Ohio July 28, 2017).

[6] Jennifer M. Ortman, et al, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU, at 2-3 (May 2014), https://www.census.gov/prod/2014pubs/p25-1140.pdf.

2012. By 2050, over 83 million will be.[7] Life expectancies are also climbing. While life expectancy at birth hovered around 70 in 1960 and 1970, Americans born in 2015 are projected to live an average of 78.8 years.[8] And while 65-year olds had an average further life expectancy of 15.2 years in 1960, similar individuals now survive 19.4 years.[9] These numbers will likely continue to improve, with longevity expected to incrementally increase through 2030.[10]

The per-person cost of medical care in the United States is also strikingly high. In 2015, the United States spent an estimated $9,990 per person on health care,[11] more than twice the per-capita outlays in the United Kingdom.[12] Those costs are unlikely to go down: American healthcare expenditures, and their

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[7] *Id.* at 16.

[8] *Health, United States, 2016: With Chartbook on Long-Term Trends in Health*, U.S. CTRS. FOR DISEASE CONTROL, at 116, Table 15 (May 2017), https://www.cdc.gov/nchs/data/hus/hus16.pdf.

[9] *Id.*

[10] Vasilis Kontis, et al, *Future Life Expectancy in 35 Industrialised Countries: Projections with a Bayesian Model Ensemble*, THE LANCET (Feb. 21, 2017), http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)32381-9/fulltext.

[11] *NHE Fact Sheet*, CTRS. FOR MEDICARE AND MEDICAID SERVS., https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html (last visited Nov. 11, 2017).

[12] *How does UK healthcare spending compare internationally?*, OFFICE FOR NATIONAL STASTICS (UNITED KINGDOM) (Nov. 1, 2016), https://visual.ons.gov.uk/how-does-uk-healthcare-spending-compare-internationally/.

implications for employers, are projected to grow faster than inflation through 2025.[13]

In an era of aging populations and ever-increasing healthcare costs, employers must be able to predictably determine when retiree healthcare benefits provided in a collective bargaining agreement vest for life and when they do not. Indeed, the financial consequences of that question are staggering. The cost of providing lifetime healthcare benefits can easily exceed tens or hundreds of millions of dollars. *See, e.g.*, *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 428–429 (6th Cir. 2010) (CEO testifying that vested retiree healthcare liabilities "could have bankrupted the company"); *Zino v. Whirlpool Corp.*, 47 F. Supp. 3d 561, 565 (N.D. Ohio 2014) (noting $169 million present value of benefits in controversy). Such costs are substantially higher for those companies with hundreds of thousands of retirees.[14]

Given the significant costs potentially at stake, Congress has long maintained a "policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith*, 371 U.S. at 200. Uniform, predictable rules may "avoid a patchwork of different interpretations of a plan . . . that covers employees in different jurisdictions," *Conkright v. Frommert*, 559 U.S. 506, 517 (2010), and reduce "considerable inefficiencies, which the employer might choose to offset by lowering benefits levels," *Fort Halifax*

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[13] *NHE Fact Sheet*, note 11, *supra*.

[14] Malcolm Gladwell, *Overdrive: Who Really Rescued General Motors?*, THE NEW YORKER (Nov. 1, 2010), http://goo.gl/yLxTpC (noting that, as of 2007, General Motors had around 517,000 retirees).

Packing Co. v. Coyne, 482 U.S. 1, 10 (1987). Understanding which obligations are vested, and which terminate when a contract expires, is thus vital to employers' willingness to continue offering retiree health benefits in an increasingly complex marketplace.

For similar reasons, Congress has put a special emphasis on enforcing the written terms of ERISA welfare benefits plans—such as plans that provide for retiree healthcare benefits, *see Tackett*, 135 S. Ct. at 933. "[F]ocus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 612 (2013) (brackets and internal quotation marks omitted). By "assuring a predictable set of liabilities," Congress meant to "induc[e] employers to offer benefits," *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002), despite not requiring them to do so, *Conkright*, 559 U.S. at 516.

B. Sixth Circuit Decisions Reached After *Tackett* Undermine Predictability and Attach Enormous Risks to Collectively Bargained Retiree Healthcare Benefits.

The decision below undermines predictability and uniformity by creating a circuit split between the Sixth Circuit and the rest of the country. *See* Pet. 18–19. Here, as well as in *Kelsey-Hayes*, the Sixth Circuit resurrected the *Yard-Man* inferences, used them to find a collective bargaining agreement ambiguous, and relied on extrinsic evidence to find a right to lifetime healthcare benefits nowhere mentioned in the

plain text of the contract. As Judge Sutton explained, "every other circuit in the country" would have reached a different result—namely, that the contract unambiguously limited retiree healthcare benefits to the duration of the agreement. *Reese*, 854 F.3d at 888 (Sutton, J., dissenting). The Sixth Circuit has thus "abrad[ed] an inter-circuit split" and fallen "out of step" with the rest of the country. *Id.* at 890, 893.

The decision below also creates severe internal confusion within the Sixth Circuit itself. Though it and *Kelsey-Hayes* held that benefits vested for life, other Sixth Circuit cases interpreting similar contracts have followed *Tackett* and held that retiree healthcare benefits *did not* vest for life. *See Gallo*, 813 F.3d at 269–70; *Cole*, 855 F.3d at 699–702. In fact, the decision below, *Kelsey-Hayes*, and *Cole* form a trio of cases all released on April 20, 2017—two going one way, the third going another. The Sixth Circuit *intentionally* released those opinions on the same day, *Kelsey-Hayes*, 872 F.3d at 388 (Gibbons, J., concurring in denial of rehearing en banc), presumably because it was fully aware that those decisions were in irreconcilable conflict, and it wanted to avoid any single decision having first-in-time precedential status over any other. As a consequence, Sixth Circuit case law is now "a mess," *id.* at 390 (Griffin, J., dissenting from denial of rehearing en banc), and the confusion has metastasized through numerous confused district court decisions throughout the circuit, Pet. 24–25.

The Sixth Circuit has proven unwilling or unable to resolve this uncertainty. Parties in all three of the April 20 cases filed petitions for rehearing en banc seeking to bring clarity to Sixth Circuit law. All three

petitions were denied. In a candid opinion, Judge Sutton explained why: though "[a]n intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en banc review," in these cases, en banc review would likely "lead to nothing gained" as "there is a real possibility that we would not have nine votes for any one ... approach[.]" *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring). In the absence of en banc review, only this Court can resolve this inter- and intra-circuit confusion.

Review by this Court is particularly important because the Sixth Circuit's muddled precedents inflict an outsized harm given the number of retiree healthcare cases that are litigated in that jurisdiction. Dissenting from one denial of review en banc, Judge Griffin explained:

> It is no secret that a combination of several factors—including the number of unionized workforces (and retirees) within our Circuit, the various economic downturns in several of the manufacturing sectors that led to corporate restructuring and the cutting of benefits, and our pro-retiree *Yard-Man* inference—has led to the maintenance of numerous retiree healthcare cases within our jurisdiction.

Id. at 392 (Griffin, J., dissenting from denial of rehearing en banc). Covering Michigan, Ohio, Kentucky, and Tennessee, the Sixth Circuit encompasses much of the country's industrial heartland, and is home to many employers, retirees, and union headquarters. As a result, a seemingly

endless stream of retiree healthcare cases have been litigated in that jurisdiction. The problem has been exacerbated by forum shopping: parties who know that the text of their contracts will be read to bar their claims in other circuits have rationally chosen to file suit in the Sixth Circuit whenever possible. One need look no further than this case for an example. Respondents "counter-sued in the Eastern District of Michigan, even though [petitioner] had no employees or facilities within the Sixth Circuit." Pet. 5. Given the Sixth Circuit's geography and parties' temptation to forum shop, it is no surprise that "countless" cases are presently "percolating" in that Circuit's district courts, *see Kelsey-Hayes*, 872 F.3d at 392 (Griffin, J., dissenting from denial of rehearing en banc).

The uncertainty created by the Sixth Circuit's resuscitation of the *Yard-Man* inferences is untenable. Employers now face the very real possibility that the outcome of a case will turn largely on where suit is brought or on which line of Sixth Circuit law a panel chooses to follow. The stakes, moreover, are exceptionally high: A finding of lifetime healthcare benefits can increase costs by hundreds of millions of dollars for employers with even reasonably sizeable retiree populations, imposing a burden for which those employers neither bargained nor prepared, and one that can risk the financial health of entire enterprises. *See* Part I.A.

Faced with such enormous and uncertain risks, present and future companies may rationally choose not to offer retiree healthcare benefits at all, and thus avoid these dangers altogether. *See Conkright*, 559 U.S. at 517 (noting that "a patchwork of different interpretations of a plan" "would introduce

considerable inefficiencies in benefit program operation" and "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them"). Such a result would undermine "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO*, 536 U.S. at 379.

This Court's guidance is thus needed to restore the uniform interpretation *Tackett* so clearly sought to impose. By reanimating the *Yard-Man* inferences, the Sixth Circuit has once again clouded retiree healthcare benefits with uncertainty. And by refusing to resolve that uncertainty via en banc review on three recent occasions, with judges going so far as to acknowledge conflict and yet further lament that the Circuit appears unable to agree on a majority view, *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring in denial of rehearing en banc), the Sixth Circuit has demonstrated that only this Court can bring predictability to this area of law. The petition for certiorari should accordingly be granted.

II. The Decision Below Contradicts This Court's Recent Decision in *Tackett* and Should be Summarily Reversed.

A. *Tackett* Rejected The *Yard-Man* Inferences And Instructed Lower Courts To Interpret Collectively Bargained Retiree Healthcare Provisions According To Ordinary Contract Principles.

The Sixth Circuit's confusion is not a result of this Court's lack of clarity. In *Tackett*, the Court took pains to reject not just the holding then under review, nor even just *Yard-Man*'s general theory that courts

should put "a thumb on the scale in favor of" vesting. *Tackett*, 135 S. Ct. at 935. Rather, the Court also examined and rejected a whole series of particularized *Yard-Man* rules of construction, abrogating "the inferences applied by *Yard-Man* and its progeny." *Id.*; *see also id.* at 933 ("[T]he Court of Appeals applied the *Yard-Man* inferences . . . . As we now explain, those inferences conflict with ordinary principles of contract law."); *id.* at 937 ("We reject the *Yard-Man* inferences as inconsistent with ordinary principles of contract law.").

In place of the discredited *Yard-Man* inferences, the Court identified several ordinary principles of contract law to guide interpretation of collective bargaining agreements going forward. *First*, the Court reiterated "the rule that contractual provisions ordinarily should be enforced as written" and that "the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 933, 936 (internal quotation marks omitted). *Second*, it held that courts must not "refuse[] to apply general durational clauses to provisions governing retiree benefits," but should rather "consider the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 936–37 (internal quotation marks omitted). *Third*, the Court emphasized "the traditional principle that courts should not construe ambiguous writings to create lifetime promises," *id.* at 936, and cited approvingly to authorities requiring "clear and express language" before finding a benefit to have vested for life, *id.* at 937 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)).

B. The Decision Below is Plainly Incorrect Under *Tackett*'s Ordinary Contract Principles.

Application of *Tackett*'s principles should have made "quick work of this case." *Reese*, 854 F.3d at 888 (Sutton, J., dissenting). The parties' 1998 collective bargaining agreement lacked any specific written promise that the company would provide retiree healthcare benefits for life. To the contrary, "the agreement contained a durational clause that limited all of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement." *Id.* In addition, the contract made expressly clear that the Group Benefit plan—which included retiree healthcare benefits—"run[s] concurrently with" the collective bargaining agreement, far short of commitment for life. *See* Pet. App. 114–115. Under this plain text, the parties unambiguously did not agree to lifetime benefits, and those benefits should have "cease[d], in the ordinary course, upon termination of the bargaining agreement." *Tackett*, 135 S. Ct. at 937.

Yet the Sixth Circuit determined otherwise. Despite no textual indication of intent to permanently vest retiree healthcare benefits, the court held the agreement ambiguous, *Reese*, 854 F.3d at 882–83, and further held that extrinsic evidence "indicate[s] that [petitioner], the retirees, and the retirees' spouses, intended and expected that the healthcare benefits provided were vested for life," *id.* at 883.

The lower court was able to reach that flawed conclusion only by relying upon the same *Yard-Man* inferences that this Court rejected in *Tackett*. *First*, the Sixth Circuit disregarded the contract's general

durational clause. It reasoned that because other provisions of the agreement contained more particular durational clauses, it could not "presume that the general-durational clause . . . says everything about the parties' intentions." *Id.* at 882. The Sixth Circuit deployed similar reasoning in *Kelsey-Hayes*, where it found that "[t]he use of three different types of durational language for specific provisions within the agreement contributes further to the ambiguity." 854 F.3d at 872. This logic is straight from *Yard-Man*, which held that "[v]ariations in language used in other durational provisions of [an] agreement may . . . provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous," 716 F.2d at 1480.

But *Tackett* explicitly rejected "look[ing] to other provisions of [an] agreement" in order to infer from durational limits on different benefits an intent to vest retiree healthcare benefits for life. *See* 135 S. Ct. at 934. It "disagree[d]" that this reasoning is consistent with "ordinary principles of contract law," *id.* at 935, and held that refusal to apply a general durational clause to provisions governing retiree benefits "distort[s] the text of the agreement," *id.* at 936. Judge Sutton later explained that this is because general durational clauses "provide a baseline or default rule" applicable to all provisions in a contract, unless a given provision contains "*more specific limits* relevant to" it. *See Gallo*, 813 F.3d at 271. "Absent a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in [a collective bargaining agreement]: 'until this agreement ends.'" *Id.* at 269. Thus, the fact that retiree healthcare provisions contain no specific time limitation, while other provisions do, proves only

that the general durational clause applies—not that such benefits are guaranteed for life.

Second, the decision below reasoned that the parties' contract was "silent on whether the benefits continue past the termination date of the agreement," and held that "this silence, rather than resolving ambiguity, furthers it." *Reese*, 854 F.3d at 882. This reasoning too is progeny of *Yard-Man*, which held that "the nature of [retiree] benefits . . . provides another inference of intent" "when the collective bargaining agreement is silent," 716 F.2d at 1482. It is also typical of *Yard-Man*'s successors, which held that when durational limits were silent as to retiree healthcare benefits, they were inapplicable to those benefits. *See, e.g.*, *Noe v. PolyOne Corp.*, 520 F.3d 548, 554 (6th Cir. 2008) (quoting *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("[A]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits.")); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1074 (6th Cir. 2008) ("[A] durational limitation must include a specific mention of retiree benefits in order to apply to such benefits.").

Tackett forcefully rejected this reasoning. It explicitly held that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." 135 S. Ct. at 937, and further rejected cases that had "requir[ed] a contract to include a specific durational clause for retiree health care benefits to prevent vesting," *id.* at 936. It explained instead that courts must "consider the traditional principle that [they] should not construe ambiguous writings to create

lifetime promises," *id.*, and noted that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at 937; *cf. Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013) (if a significant concession is alleged in a contract, "we would expect a clear indication of such [and] not inscrutable silence").

Third, and finally, the decision below found ambiguity because "healthcare benefits were tied to pension eligibility." *Reese*, 854 F.3d at 882. The court reasoned that this "create[s] an ambiguity about the parties' intentions" and "allows a court to explore the extrinsic evidence to discover what the parties actually intended." *Id.* at 882–83. This strategy arose in *Yard-Man*'s progeny, which routinely relied on the tying of pension and healthcare eligibility as evidence of vesting. *See, e.g.*, *Noe*, 520 F.3d at 558 ("[L]anguage in an agreement that ties eligibility for retiree health benefits to eligibility for a pension indicates an intent to vest the health benefits."); *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2005) ("*Yard-Man* recognized an inference that 'status' benefits, including retiree benefits, continue as long as the status is maintained . . . . Because the Supplemental Agreement ties eligibility for retirement-health benefits to eligibility for a pension, in other words, there is little room for debate that the retirees' health benefits vested upon retirement.").

The Court in *Tackett*, however, rejected this inference as well. The Court termed it "inconsistent with ordinary principles of contract law," and singled it out as a way in which "*Yard-Man* and its progeny affected the outcome." 135 S. Ct. at 937. As Judge Sutton later explained:

> *Tackett* rejected this kind of "tying" analysis as a relic of a misdirected frame of reference . . . . It is not surprising that CBAs address pension and healthcare benefits for retirees. And it is not surprising that the CBAs make pensioner status a condition of receiving healthcare benefits. But neither one of these features of the CBAs means that retirees will get those benefits *for as long as* they earn a pension.

Gallo, 813 F.3d at 272.

In short, all of the reasons the Sixth Circuit gave for finding ambiguity in the collective bargaining agreement were explicitly rejected by this Court in *Tackett*. How, then, did the Sixth Circuit justify its departure from this Court's precedent?

The answer appears to lie in what the Sixth Circuit asserts is a difference between "infer[ing] vesting" and "finding ambiguity." *Reese*, 854 F.3d at 882. The court acknowledged that it could "not infer vesting from silence," but nonetheless said it could "find ambiguity . . . partially from . . . silence." *Id.* Similarly, although the court admitted that "[i]nferring vesting from tying alone violates *Tackett*," it declared that "[f]inding an *ambiguity* from tying" "moves us closer to . . . discovering the parties' true intentions." *Reese*, 854 F.3d at 883 (emphasis added). In the court's view, though the *Yard-Man* inferences could no longer create vesting, they could create *ambiguity* about vesting.

But in order for a contract to be ambiguous, there must be "two competing interpretations, both of which are fairly plausible readings of the language." *Id.* at

890 (Sutton, J., dissenting). And inferences that are inconsistent with ordinary principles of contract law are, by definition, incapable of creating such a plausible interpretation. "A forbidden inference cannot generate a plausible reading." *Id.* at 891. And without that plausible alternative reading, the contract in this case cannot be found ambiguous.

The Sixth Circuit's continuing use of *Yard-Man* inferences to find ambiguity in textually plain contracts is thus "*Yard-Man* re-born, re-built, and re-purposed for new adventures," *id.* at 890–91, and it flatly contradicts this Court's jurisprudence.

C. The Sixth Circuit's Clear Error With Respect To Recent Supreme Court Law Warrants Summary Reversal.

Summary reversal is appropriate when the "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (per curiam) (Gorsuch, J., dissenting). It is especially appropriate, moreover, when a court of appeals fails to apply—or balks at fully applying—recent Supreme Court precedent. *See, e.g.*, *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam) ("consider[ing] for the second time the Ninth Circuit's determination that respondent stockholders' complaint states a claim against petitioner fiduciaries for breach of the duty of prudence" under ERISA, and summarily vacating that determination because "the Ninth Circuit did not correctly apply" the Court's first decision).

Here, despite this Court's clear guidance in *Tackett*, the Sixth Circuit read a collective bargaining agreement as somehow promising retiree healthcare benefits for life despite a clear durational clause and

the absence of any textual indication of lifetime vesting. It did so by using *Yard-Man* inferences that this Court painstakingly rejected and by refusing to apply ordinary principles of contract interpretation that *Tackett* elucidated. Such a clear error warrants this Court's summary reversal.

Summary reversal is necessary, moreover, as the question presented by the petition is both greatly important and unlikely to resolve on its own. So long as Sixth Circuit law remains muddled and in conflict with other circuits, companies within and outside the Sixth Circuit will face the uncertain risk that a panel will impose on them obligations that can cost tens or hundreds of millions of dollars—obligations that they never agreed to bear. And because "there is good reason to fear that a majority . . . would fail to agree on a majority view," *Kelsey-Hayes*, 872 F.3d at 390 (Sutton, J., concurring in denial of rehearing en banc), the Sixth Circuit appears unlikely to resolve this issue itself.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, summarily reverse the decision below, and remand for judgment to be entered in favor of Petitioners.

November 6, 2017

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RECORD AND BRIEFS

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No. 17-515

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA, LLC,

Petitioners,

v.

JACK REESE; FRANCES ELAINE PIPPE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR WHIRLPOOL CORPORATION IN SUPPORT OF PETITIONERS

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MOTION OF WHIRLPOOL CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus Whirlpool Corporation respectfully moves pursuant to Rule 37.2 of the Rules of this Court for leave to file a brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief, and their consent is on file with the Clerk. Respondent does not consent to this filing.

Whirlpool Corporation is a leading global manufacturer of home appliances, employing more than 20,000 people in the United States. Whirlpool has substantial operations in the Sixth Circuit, including its headquarters in Michigan and large manufacturing operations in Ohio and Tennessee, as well as in other circuits. Whirlpool therefore has a powerful interest in the Sixth Circuit following this Court's precedents regarding the vesting of retiree healthcare benefits, see *M&G Polymers USA* v. *Tackett*, 135 S.Ct. 926 (2015), and in resolving the circuit split that has resulted from the Sixth Circuit's failure to do so. Further confusing the legal rules applicable to corporations like Whirlpool that do business in the Sixth Circuit, that court of appeals has developed competing and irreconcilable lines of authority addressing the vesting of retiree healthcare benefits, which the court has been unable to resolve en banc.

The question presented in the petition is of immediate and concrete importance to Whirlpool. Whirlpool is a defendant in protracted and costly retiree healthcare benefits litigation in the Northern District of Ohio. That case has been litigated in the district court for six years, culminating in a decision vesting retiree healthcare benefits that would not have been held vested in any other circuit in the Nation. See *Zino* v. *Whirlpool Corp.*, No. 11-CV-1676, 2017 WL 3219830 (N.D. Ohio July 27, 2017). Whirlpool has

appealed that erroneous decision. Nos. 17-3851/3860 (6th Cir.).

Whirlpool also possesses a practical understanding of the effect of the Sixth Circuit's vesting rule as compared to the contrary rule applied in other circuits. Whirlpool has litigated the same healthcare-vesting question in the Eighth Circuit, which—unlike the Sixth Circuit—is in step with this Court's precedent. See *Maytag Corp.* v. *UAW*, 687 F.3d 1076 (8th Cir. 2012). Whirlpool understands the realities of these competing rules and has a strong interest in advocating a uniform nationwide standard that conforms with this Court's *Tackett* decision.

For these reasons, Whirlpool believes that its perspective on the importance of the issues raised by the petition will assist the Court in its consideration of this case.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the foregoing motion for leave to file this *amicus* brief.[1]

STATEMENT

The petition asks the Court to resolve an entrenched split in authority over the proper legal rule for interpreting healthcare benefit provisions in collective bargaining agreements ("CBAs"). This case provides an appropriate vehicle for resolving the matter, for the CBA between petitioners (collectively "CNH") and the union that represented respondent retirees is similar in many respects to contracts in effect throughout the country. The question presented is whether these ubiquitous types of contract terms require employers to pay healthcare benefits for the life of every retiree, even after the contract expires.

CNH entered into the CBA at issue with the United Automobile, Aerospace, and Agricultural Workers of America in 1998. *Reese* v. *CNH Indus. N.V.*, 854 F.3d 877, 879 (6th Cir. 2017) ("*Reese III*"). As is common, that CBA offers healthcare benefits for retirees and spouses entitled to receive a pension: "Employees who retire under that * * * Pension Plan * * * after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of the Plan, shall be eligible for the Group benefits as described in the following paragraphs." *Ibid.* By its terms, the CBA expired on May 2, 2004. Pet. App. 115.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

Respondents are former employees who retired between 1994 and 2004 and their spouses. *Reese III*, 854 F.3d at 879. They filed suit against CNH in the U.S. District Court for the Eastern District of Michigan in 2004, claiming an entitlement to lifetime healthcare benefits under the 1998 CBA. *Ibid.* Thirteen years of litigation have followed, including three appeals to the Sixth Circuit, whose third opinion (*Reese III*) is the subject of petitioners' request for certiorari review.

The panel majority in *Reese III* recognized that, since its prior decision in *Reese II*, this Court decided *Tackett*. *Tackett* overturned longstanding Sixth Circuit case law—beginning with *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476 (1983)—which had adopted unfounded inferences that retiree healthcare benefits vested for life. Nonetheless, relying heavily on the four-Justice concurrence in *Tackett* (rather than the five-Justice majority), the court in *Reese III* held that the 1998 CBA was ambiguous and that extrinsic evidence suggested an intent to confer benefits on CNH employees for life. 854 F.3d at 883. Essentially, the court revived *Yard-Man* as an inference of contractual ambiguity, instead of a direct inference of vesting, replacing one heavy thumb on the scale with another.

Judge Sutton dissented. He explained that the vesting rules laid out in *Tackett* "should make quick work of this case." 854 F.3d at 888. The durational clause in the CBA—providing that the contract would expire in 2004—set an end date for "all of the benefits and burdens of the contract (not otherwise extended or shortened)." *Ibid.* The CBA offered no alternative expiration rule for retiree healthcare benefits, so the durational clause controlled. *Ibid.*

The Sixth Circuit denied petitioners' request for en banc review. Judge Sutton would have granted panel rehearing.

ARGUMENT

I. The Ruling Below Conflicts Squarely With This Court's Decision In *Tackett*.

1. In *Tackett*, this Court overruled the Sixth Circuit's *Yard-Man* rule, which "violate[d] ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all [CBAs]." 135 S.Ct. at 935. The Sixth Circuit had "refused to apply general durational clauses to provisions governing retiree benefits" and instead "require[d] a contract to include a specific durational clause for retiree healthcare benefits to *prevent* vesting." *Id.* at 936 (emphasis added). This approach "distort[ed] the text of the agreement" and defied "the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Ibid.*

Yard-Man was also wrong in holding that health-care benefits vest when a CBA includes termination dates for some benefits but "no provision specifically address[ing] the duration of retiree healthcare benefits." 135 S.Ct. at 934. And it was error to infer vesting from a CBA "provision that ties eligibility for retirement-health benefits to eligibility for a pension." *Id.* at 935 (internal quotation marks omitted).

In place of these mistaken inferences, *Tackett* stressed "the traditional principle that courts should not construe ambiguous writings to create lifetime promises." *Id.* at 936 (citing 3 A. Corbin, CORBIN ON CONTRACTS §553, at 216 (1960)). In this regard, *Tackett* explained (135 S.Ct. at 937, emphasis added), *Yard-Man* erred in departing from the Sixth Circuit's own approach to "*noncollectively* bargained contracts

offering retiree benefits" in *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc). *Sprague* rightly applied "ordinary principles of contract law" to conclude that "'an employer's commitment to vest such benefits is not to be inferred lightly'" and therefore "'must be found in the plan documents and must be stated in clear and express language.'" *Tackett*, 135 S.Ct. at 937. This requirement both tracks black letter contract principles and adheres to the labor-law rule that courts may "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless" the waiver is "explicitly stated" and "clear and unmistakable." *Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (2003).

Tackett embraced the related "principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" 135 S.Ct. at 937. That principle means that "'a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration.'" *Ibid.* "'But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.'" *Ibid.*

2. The Sixth Circuit's ruling in *Reese III* conflicts squarely with *Tackett*. CNH's CBA included a general durational clause terminating the agreement in 2004. Yet the majority cited the contract's supposed "silence as to the parties' intentions" regarding the duration of retiree healthcare as a source of ambiguity. 854 F.3d at 882. Likewise, the majority found ambiguity in the fact that entitlement to retiree healthcare is tied to pension eligibility. *Ibid.* These are inferences that *Tackett* expressly prohibits. See 135 S.Ct. at 936-937.

Nor is there anything to *Reese III*'s theory that although silence and tying are off limits as grounds to infer a right to lifetime benefits, these same factors serve as sources of ambiguity. *Tackett* requires clear and explicit vesting language, not ambiguity. As Judge Sutton observed in dissent, "[a] forbidden inference cannot generate a plausible reading" of the CBA. 854 F.3d at 891.

The panel's method of manufacturing ambiguity is flatly inconsistent with *Tackett*. See *supra* p. 4; 135 S.Ct. at 935, 937. The tying language "has nothing to do with the duration of the healthcare benefits." *Reese III*, 854 F.3d at 891 (Sutton, J., dissenting). "The agreement says that pensioners 'shall be eligible' for healthcare benefits *for as long as the agreement provides those benefits*—that is, until May 2, 2004—not for as long as retirees earn a pension." *Ibid.*

The panel also relied on the fact that "healthcare coverage continues past the date of retirement," unlike other CBA provisions. 854 F.3d at 882. But that is equally irrelevant. As Judge Sutton explained, this language merely preserves the benefit after an employee retires. "It does not say that benefits continue past the termination date of the agreement, much less that they continue for life." *Id.* at 890. The contract in *Yard-Man* included similar provisions, but *Tackett* specifically rejected *Yard-Man*'s inference of vested benefits based on this language. 135 S.Ct. at 934.

In short, *Reese III* held that commonplace provisions in the 1998 CBA—provisions that *Tackett* considered and rejected as evidence of vesting—rendered the CBA ambiguous. In further violation of *Tackett*, the panel then found an intent to confer lifetime benefits based on that supposed ambiguity.

3. The majority in *Reese III* derives much of its understanding of this Court's decision in *Tackett* from the Sixth Circuit's opinion on remand in that case. See 854 F.3d at 881-883. But the decision on remand "rel[ied] heavily" not on the five-Justice majority in *Tackett*, but on the four-Justice concurrence. *Id.* at 882. *Reese III* relies on the concurrence's views that "[n]o rule requires 'clear and express' language in order to show that parties intended healthcare benefits to vest," and that employer obligations may be found in "implied terms of the expired agreement." *Id.* at 881. And it relied on the concurrence in assigning little weight to the CBA's general durational cause and in using extrinsic evidence to infer a right to vested healthcare benefits. *Id.* at 881-882.

It is impossible to reconcile those principles with the Court's opinion in *Tackett*. This Court made explicit that "clear and express language" *is required* to vest benefits for life in the face of a contract's general durational clause. See 135 S.Ct. at 937 ("'an employer's commitment to vest such benefits is not to be inferred lightly'" and "'must be stated in clear and express language'"); *ibid.* (enforcing "the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement'"); *ibid.* ("'when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life'").

As the dissent below explained, the opinion for the Court in *Tackett* "should make quick work of this case." 854 F.3d at 888. Petitioners "never promised to provide healthcare benefits for life" in the 1998 CBA, "and the agreement contained a durational clause that limited *all* of the benefits and burdens of the contract (not otherwise extended or shortened) to the six-year term of the agreement." *Ibid.* Under *Tackett*, that "would

end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would." *Ibid.*; see also *id.* at 889 (Sutton, J., dissenting).

Conflicting statements in the *Tackett* concurrence are not controlling. See *Maryland* v. *Wilson*, 519 U.S. 408, 412-413 (1997). The reasoning in a concurrence does not become part of the Court's holding, even if the majority opinion "does not expressly preclude ([and] is 'consistent with') the concurrence's approach." *Alexander* v. *Sandoval*, 532 U.S. 275, 285 n.5 (2001).

4. The CBA in *Reese* even more obviously forecloses the vesting of lifetime healthcare benefits than the contract in *Tackett*. CNH's summary plan document for the 1998-2004 period repeatedly informed all employees that CNH could amend or terminate the benefit plan. See Dist. Ct. Doc. 125-19. It provided, in boldface type, that "[a]n amendment or termination of the *** benefit plans may affect not only the coverages of active employees *** but also of *** former employees who retired, died, or otherwise terminated employment." *Id.* at 3; see *id.* at 5 (same). This warning expressly reserved CNH's rights to change or terminate retiree benefits.

Furthermore, prior to the 1998 contract, CNH and its predecessor repeatedly had renegotiated contracts with the UAW, and each new agreement included language conferring revised healthcare benefits on past retirees. *Reese III*, 854 F.3d at 879. The fact that "benefits were reset" in each contract "undermines a theory of vesting because it indicates that they would have to be reset again when this agreement expired." *Id.* at 892 (Sutton, J., dissenting). There would be no need to include a retiree-benefits right in each new

contract if prior contracts already created lifetime entitlements.

* * *

In sum, it is impossible to square the Sixth Circuit's decision in *Reese III* with this Court's holding in *Tackett*. Relying on statements from the *Tackett* concurrence that the Court did not embrace, the panel refused to follow the Court's holding that, without clear language to the contrary, a general durational clause establishes the termination date for an employer's retiree healthcare benefit obligations.

II. The Circuits Are Split Over The Question Presented And The Sixth Circuit Is Internally Divided.

In addition to contradicting this Court's decision in *Tackett*, *Reese III* "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court just sutured shut." 854 F.3d at 890 (Sutton, J., dissenting). Each of these splits warrants this Court's review.

A. There Is An Entrenched And Mature Split Among The Federal Courts Of Appeals.

Petitioner's CBA includes a general durational clause and nowhere expressly grants retirees the right to healthcare benefits for life. "In every other circuit in the country, that would end this case. The durational clause would control, and the healthcare benefits would last as long as the durational clause said they would." 854 F.3d at 888 (Sutton, J., concurring); see *id.* at 889 (same). In short, "every other court in the country would handle this case differently." *Id.* at 893. A catalog of decisions from the First, Second, Third, Fifth, Seventh, and Eighth Circuits proves the point. *Id.* at 889, 893; see also *Nichols* v. *Alcatel USA, Inc.*, 532 F.3d 364, 376-378 (5th Cir. 2008). Consider the

following cases, each of which would have come out differently under the rule applied in *Reese III*.

1. In *Senn* v. *United Dominion Industries, Inc.*, 951 F.2d 806, 807-811 (7th Cir. 1992), retirees claimed a right to lifetime healthcare benefits under a series of five CBAs. Plan documents accompanying the later agreements included reservation-of-rights provisions and language expressly limiting health benefits to the term of the CBA. *Id.* at 809-810. But the early agreements merely stated that the employer "will continue" providing benefits "for retired employees," without saying anything about when those benefits expired. *Id.* at 808-809. The district court found ambiguity in all of the CBAs and proceeded to a jury trial over the meaning of extrinsic evidence. *Id.* at 811-812.

The Seventh Circuit reversed. In stark contrast to the approach in *Reese III*, the Seventh Circuit "recognized the legal proposition that, in the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract." 951 F.2d at 814. Even in the early CBAs, the reference to ongoing coverage for retirees was insufficient to vest lifetime rights: "[t]he contract documents contained no language that established a vested right for persons who were retired during the term of the agreement to enjoy welfare benefits after the termination of the [CBA]." *Id.* at 815. And without an express exception for retiree benefits, the contract's general expiration date controlled. *Ibid.* As the court summarized, "[t]he default rule in this Circuit is that 'entitlements established by collective bargaining agreements do not survive their expiration or modification.'" *Id.* at 816. "Thus, it requires more than a statement in a CBA that welfare benefits 'will continue' to create an ambiguity about vesting, for the

logical interpretation under our rule is that benefits 'will continue' for the duration of the contract." *Ibid.*

2. Likewise, in *UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 134 (3d Cir. 1999), retirees sought lifetime medical benefits under several CBAs negotiated over nearly two decades. Each contract provided that these benefits "will continue" and "shall remain" in the future, without saying when if ever the employer's obligation to provide the benefits would end; each agreement merely included a general durational clause. *Id.* at 135-136, 141.

Like the Seventh Circuit in *Senn*, the Third Circuit held that lifetime benefits had not vested. The court recognized that, "[b]ecause vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language." 188 F.3d at 139. Without such unambiguous language, the Third Circuit concluded—in stark contrast to the Sixth Circuit here—it was "more reasonable" to view the CBAs' general durational clauses as controlling, and the employer's retiree-benefit obligations therefore ended when each CBA expired. *Id.* at 141-142. The Third Circuit went on to warn against the dangers of using "extrinsic evidence in interpreting collective bargaining agreements" (*id.* at 146) and reiterated that "[s]ilence on duration * * * may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *Id.* at 147.

3. More recently, the Third Circuit followed *Tackett* and "adhere[d] to 'the traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Grove* v. *Johnson Controls, Inc.*, 2017 WL

2590762, at *3 (3d Cir. June 15, 2017) (unpublished op.). The Third Circuit therefore held that medical benefits that purportedly "continue[d]," without a set termination date, expired with the CBA. *Ibid.* The Fourth Circuit likewise rejected claims that retiree health benefits were guaranteed beyond the duration of the CBA. *Barton* v. *Constellium Rolled Prods.-Ravenswood, LLC*, 856 F.3d 348, 354 (4th Cir. 2017) (quoting *Tackett* rule that "'when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life'").

4. Whirlpool's experience litigating its obligations under Maytag CBAs shows that a reservation-of-rights provision like the one in the CNH summary plan description (*supra* p. 8) precludes vesting. The Eighth Circuit correctly held that "[w]hen the applicable [summary plan document], 'devoid of vesting language, explicitly reserves the right to modify the retiree medical benefit plan at any time,' beneficiaries 'have not met the burden of proving vesting language,' and extrinsic evidence *may not be considered.*" *Maytag Corp.* v. *UAW*, 687 F.3d 1076, 1086 (8th Cir. 2012).

5. The circuit split is lopsided, for the Sixth Circuit has struck out on its own. Nevertheless, ERISA's broad forum-selection provision allows unions and retirees to forum shop to take advantage of the Sixth Circuit's unique approach. Most courts, including those in the Sixth Circuit, read ERISA to permit retiree healthcare vesting suits in any federal district where any retiree resides. See 29 U.S.C. §1132(e)(2); *Varsic* v. *U.S. Dist. Ct. for the C. D. of Cal.*, 607 F.2d 245, 247 (9th Cir. 1979); *Oakley* v. *Remy Int'l, Inc.*, 2010 WL 503125, at *2-3 (M.D. Tenn. Feb. 5, 2010). For large (and many smaller) employers, it is easy for a plaintiff to pursue lifetime benefits in the Sixth Circuit.

This case illustrates the point. CNH sought declaratory relief in Wisconsin, where it is headquartered. But respondents filed this action in Michigan. See *Reese* v. *CNH America LLC*, 574 F.3d 315, 319 (6th Cir. 2009) (*Reese I*). Respondents won the forum dispute and secured the right to proceed in the Sixth Circuit. *Id.* at 320.

The plaintiffs in Whirlpool's case, *Maytag Corp.*, also sought to litigate in the Sixth Circuit. The union filed suit in the Western District of Michigan, where it likely would have remained had the employer not already filed a preemptive, declaratory judgment action in the Southern District of Iowa. *Maytag Corp.*, 687 F.3d at 1080-1081. So long as the Sixth Circuit maintains its divergent vesting rule, this forum shopping will continue.

6. Finally, the circuit split poses particular problems for national companies like Whirlpool, which face "a patchwork of different interpretations of a [single] plan" and therefore suffer from "considerable inefficiencies in benefit program operation." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010). For these companies, inconsistent construction of the same plan poses monumental administrative burdens.

B. The Sixth Circuit Is Internally Divided, Without The Usual Remedy Of En Banc Review.

Reese III is not only at odds with established law in other circuits, but it also represents one side of an irreconcilable split within the Sixth Circuit itself. See *Inyo Cty.* v. *Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to consider issue on which Ninth Circuit "expressed divergent views"); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (observing that Court granted certiorari

"[b]ecause of this intracircuit conflict"). That the Sixth Circuit is deeply divided over the legal standard to apply in deciding whether retiree medical benefits have vested, and has been unable to resolve that division through en banc review, provides an additional reason for a grant of certiorari. See SUPREME COURT PRACTICE 255 (10th ed. 2013); *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 27 (1994) ("The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions").

1. By contrast to *Reese III*, two Sixth Circuit decisions have followed *Tackett*'s rule that a CBA's general durational clause controls unless the contract includes language granting a right to vested retiree benefits. In *Gallo* v. *Moen Inc.*, 813 F.3d 265, 267 (6th Cir. 2016), the court in an opinion by Judge Sutton rejected plaintiffs' claim to lifetime benefits, notwithstanding language in the CBAs guaranteeing "[c]ontinued" healthcare for retirees. As the court explained, "we should not expect to find lifetime commitments in time-limited agreements." *Id.* at 269. Accordingly, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." *Ibid.* The three-year durational clause in *Gallo* meant the parties were "entitled to infer that any right to the benefit ends after three years." *Id.* at 274.

Judge Stranch dissented. Like the majority in *Reese III*, she would have found the contract ambiguous—despite the CBAs' general durational clause—and would have used extrinsic evidence to infer a right to lifetime benefits. *Id.* at 275.

Cole v. *Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), issued the same day as *Reese III*, followed *Gallo*. Because the CBAs in *Cole* "included a general durational clause that terminated the agreement after three years" without any language "provid[ing] a specific expiration date for [healthcare] benefits," the employer's duty to furnish benefits ended after three years. *Id.* at 700. Judge White wrote separately to voice disagreement with the decision in *Gallo*, which she described as "install[ing] duration clauses as the new absolute determiner of intent." *Id.* at 702. Like the majority in *Reese III*, Judge White "would have found the CBA in [*Gallo*] ambiguous and its interpretation subject to parol evidence." *Ibid.* Unable to distinguish *Gallo* from *Cole*, however, she "reluctantly concur[red]." *Ibid.*

2. Also decided the same day as *Reese III* and *Cole* was *UAW* v. *Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), another divided panel opinion. This time, however, the majority was in step with the majority in *Reese III* and in conflict with *Gallo* and *Cole*. As in *Gallo* and *Cole*, the CBA in *Kelsey-Hayes* included standard prospective language—"that health care 'shall be continued' without specifying for how long"—and a "general-durational clause." *Id.* at 868. As in *Reese III*, however, the majority in *Kelsey-Hayes* found the contract ambiguous. "Absent is explicit language that the benefits at issue vest for life," the court reasoned, "but also absent is a clear indication that they do not." *Id.* at 872. Accordingly, the *Kelsey-Hayes* majority sorted through a "mountain of extrinsic evidence" and (as in *Reese III*) used this evidence to infer that retirees were entitled to lifetime health benefits. *Id.* at 869-871.

Judge Gilman dissented. He would have followed "*Gallo*'s holding that we should not infer lifetime

benefits when, absent a specific carve-out, there is a general durational clause in the CBA." 854 F.3d at 875-876. As Judge Gilman explained, "*Gallo* applied ordinary contract principles to the CBA before it to conclude that the healthcare benefits were unambiguously not vested for life. Because the facts of this case are materially indistinguishable, I see no way to avoid arriving at the same conclusion." *Id.* at 876.

3. Parties sought en banc rehearing in *Cole*, *Reese III*, and *Kelsey-Hayes*, but the court denied rehearing in each. Four judges wrote separately in connection with the order denying rehearing in *Kelsey-Hayes*, and those opinions further demonstrate how deeply and irreparably divided the circuit is with regard to vesting principles.

Judge Sutton, concurring in the denial, recognized that "[b]y nearly every measure, this case deserves en banc review," for "[d]istinct perspectives on the lifetime vesting of healthcare benefits in time-limited collective bargaining agreements led us to release three opinions on the same day that face in different directions." *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 389 (6th Cir. 2017). "[S]ome of those decisions are inconsistent with [*Tackett*]," he continued, "and some of them contrast with the approach our sister circuits have taken on the same issue." *Id.* at 390. But the Sixth Circuit is in no position to resolve this intra-circuit split, he explained. "With 16 judges on the en banc court, there is a real possibility that we would not have nine votes for any one of" the courts' multiple "approaches" to vesting. *Ibid.*

Judge Griffin, joined by Judge Gilman, would have granted en banc review. Like Judge Sutton, these judges acknowledged that the Sixth Circuit's vesting "decisions are in irreconcilable conflict regarding how

courts are to view durational clauses," and circuit "law is one of contradiction and confusion in an area of the law that demands consistency and clarity." *Id.* at 391-392. Quite simply, "[o]ur post-*Tackett* case law is a mess," for "*Gallo*, *Cole*, *Reese*, and *Kelsey-Hayes* cannot all be correct." *Id.* at 390, 392. Judge Gibbons, by contrast—who wrote the majority opinions in *Kelsey-Hayes* and *Reese III*—thought en banc review was unnecessary because "factual differences between the cases determined the outcomes." *Id.* at 388.

The Sixth Circuit is irreconcilably divided over a question of *law*—whether a contract's general durational clause controls absent a stated intention in the contract to vest retiree healthcare benefits for life. See also *Serafino* v. *City of Hamtramck*, 2017 WL 3833206, at *6-8 (6th Cir. Sept. 1, 2017) (relying on general durational clauses to hold that retiree healthcare benefits had not vested). Indeed, Judge Gibbons' statement that each of the Sixth Circuit's vesting cases turns on its facts betrays the court's conflicting *legal* positions. The rule of law applied in *Gallo* and *Cole* does not assign any weight to the "factual differences" to which Judge Gibbons refers. Rather, it follows the predictable, straightforward rule that, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." *Gallo*, 813 F.3d at 269.

In short, the Sixth Circuit has and will remain the preferred venue for unions and retirees seeking to infer a right to lifetime healthcare benefits from CBAs that are silent on the subject. That court is hopelessly divided internally over the issue, and squarely at odds with other courts of appeals that apply *Tackett*.

III. This Case Presents An Issue Of Exceptional Importance.

1. The legal standard *Reese III* applied creates unpredictability, complexity, and enormous cost by abandoning *Tackett*'s reliance on written plan documents and established principles of contract interpretation.

It is a "core" requirement of ERISA that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995) (quoting 29 U.S.C. §1102(a)(1)). Accordingly, "the rule that contractual 'provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.'" *Tackett*, 135 S.Ct. at 933 (alterations in original). This "'focus on the written terms of the plan is the linchpin of' ERISA, for it ensures that the '"system * * * is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place."' *Ibid.* (alterations in original). By "assuring a predictable set of liabilities," ERISA aims to "induc[e] employers to offer benefits." *Conkright* v. *Frommert*, 559 U.S. 506, 517 (2010).

Reese III topples this incentive structure. CBAs conferring retiree healthcare benefits necessarily use prospective language to describe benefits, and the reasoning of the panel below would permit courts to find ambiguity and resort to extrinsic evidence in most cases. "Predictability as to the extent of future obligations would be lost." *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

Massive and protracted litigation inevitably will follow, adding to "a tsunami of retiree medical

litigation" that already "has crashed over the dockets of our nation's federal courts," imposing severe burdens on employers and the judicial system. http://www.jonesday.com/retiree-medical-litigations-dirty-little-secret-location-location-location-08-04-2009 (cataloging plaintiffs' rush to the Sixth Circuit under *Yard-Man*).

Unions and retirees who failed to obtain a written right to vested benefits through collective bargaining could come to court years or even decades later, claiming that hand-picked selections from a vast universe of extrinsic evidence implied a right to lifetime coverage. Using such evidence to impose an extraordinary financial obligation on the employer—one that the unions and employees could not obtain through collective bargaining—runs afoul of federal labor laws, which prohibit end-runs around the bargaining process. See *Chi. & N.W. Ry. Co.* v. *United Transp. Union*, 402 U.S. 570, 581-583 (1971) (describing purpose of Norris-LaGuardia Act).

Worse, such litigation is unpredictable. This case illustrates the point. Without any express promise of lifetime healthcare benefits—and in the teeth of a general durational clause and reservation-of-rights language—the panel inferred a right to lifetime coverage. It based this finding on just two strands of extrinsic evidence, 854 F.3d at 883, neither of which suggests that CNH intended to commit itself to lifetime benefits. See *id.* at 892-893 (Sutton, J., dissenting).

Litigation under the *Reese III* approach, involving years' or even decades' worth of extrinsic evidence, is also extraordinarily time-consuming and expensive and imposes severe burdens on federal district courts. CNH has been litigating *Reese* for *13 years*. The case is now on its third appeal and headed back for additional

proceedings on remand. Meanwhile, Whirlpool's vesting litigation in the Northern District of Ohio has taken six years to reach judgment, following a series of conflicting interim decisions, with appellate review and potentially more litigation to come.

Such protracted, costly litigation, culminating in unpredictable results based on selections from a "mountain of extrinsic evidence," *Kelsey-Hayes*, 854 F.3d at 869, eviscerates the incentives that ERISA aims to create. It produces "substantial disincentives for even offering [benefit] plans," *Moore*, 856 F.2d at 492, accelerating the already pronounced erosion of these programs nationally. See Tricia Neuman & Anthony Damico, *Fading Fast: Fewer Seniors Have Retiree Health Insurance* (May 15, 2016) (43% drop in large employers offering retiree health coverage since 1988), https://www.kff.org/medicare/issue-brief/fading-fast-fewer-seniors-have-retiree-health-insurance.

2. *Reese III* undercuts ERISA's effort to afford employers special flexibility in providing healthcare benefits. Unlike pensions, which vest automatically, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Tackett*, 135 S.Ct. at 933.

This flexibility serves important federal policies. "[M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore*, 856 F.2d at 492. It is no surprise, therefore, that most people—including those covered by Medicare and Medicaid—are subject to changes to their health plans and premiums. See, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 582-583 (2012) (describing

Congress' need to change terms of federal medical benefit programs). Likewise, in ERISA, "Congress recognized that 'requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.'" *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); see also *Moore*, 856 F.2d at 492 ("Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables"). "Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour." *Ibid.*

By locking employers into high-cost, inefficient retiree medical plans that have fallen out of step with the nation's health delivery system, *Reese III* hobbles employers. Midwest manufacturers with employees in the Sixth Circuit, already under heavy pressure to remain competitive, have been forced to take on additional, massive liabilities. See *UAW* v. *Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007) (acknowledging that vested medical benefits threatened GM's "financial position").

Massive unfunded healthcare benefits are out of tune with changes in the provision of healthcare. Rising medical costs have driven large employers into bankruptcy.[2] Bankruptcy wipes out benefits and

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[2] *E.g.*, *Now for the Reckoning*, THE ECONOMIST (Oct. 13, 2005) (Delphi bankruptcy driven by pension and welfare benefit costs), http://www.economist.com/node/5017138#print; Steve Miller, *Full Text of Remarks by Delphi's Steve Miller*, FINANCIAL TIMES (Oct. 10, 2005), https://www.ft.com/content/72f2db2c-39a5-11da-806e-00000e2511c8 (GM had $80 billion "of accrued retiree health care obligations" and was financially unable to wait until current labor contracts expired to reduce this obligation). See also Alan

eliminates jobs.[3] And funding legacy welfare benefits diverts investment from new plants and requires severe cost-cutting measures. Ultimately, therefore, employees and retirees bear the burden. See Phillip Moderson, *Following a Dangerous Precedent: The California Rule and the Kansas Pension Crisis*, 64 U. KAN. L. REV. 1113, 1116 (2016) (a permissive vesting rule "harms the state employees the rule seeks to protect"). To remain viable, large employers threatened by judicially vested healthcare obligations will need to shrink the size of their work force, offer fewer or no healthcare benefits, or both. So "while [particular] plaintiffs" may be "helped by a decision in their favor," such a ruling would "decrease protection for future employees and retirees." *Moore*, 856 F.2d at 492.

Local governments too face crushing retiree healthcare costs that they need to reduce to stay solvent and be able to continue to provide services to residents.[4] A recent Michigan Task Force report prepared at the request of Governor Snyder documented that some 330 Michigan municipalities and counties have $10 billion in unfunded retiree healthcare benefit obligations, only $3 billion in assets to cover that liability, and an annual shortfall in contributions of $300 million which

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Reuther, *By Saving Billions in Retiree Health & Pension Benefits, Auto Bailouts Were an Even Bigger Success Than Acknowledged*, Economic Policy Institute (Mar. 12, 2015), http://www.epi.org/blog/by-saving-billions-in-retiree-health-and-pension-benefits-auto-bailouts-were-an-even-bigger-success-than-acknowledged.

[3] Delphi, for example, had to "cut thousands of workers" before emerging from bankruptcy. Chris Isidore, *Delphi Actions Could Bankrupt GM*, CNNMoney.com (Mar. 31, 2006), http://money.cnn.com/2006/03/31/news/companies/delhi/.

[4] *E.g.*, *Flint Manager Warns of Bankruptcy Over Retiree Costs*, Bloomberg News (July 17, 2014), http://www.crainsdetroit.com/print/593941.

means these unfunded obligations continue to grow. *Responsible Retirement Reform for Local Government Task Force, Report of Findings and Recommendations for Action* 8, 12 (July 2017), http://www.michigan.gov/documents/snyder/R3_Task_Force_Report_579101_7.pdf. Those figures do not include the $6 billion in unfunded retiree healthcare benefits that Detroit eliminated through bankruptcy. *Id.* at 12 n.7.

Michigan local governments' already difficult struggle to restructure these liabilities is compounded by the Sixth Circuit's decisions imposing lifetime obligations that were never promised. See, *e.g.*, *Kendzierski* v. *Macomb Cty.*, 901 N.W.2d 111 (Mich. Ct. App. 2017) (finding "ambiguous" CBA vested County retirees with unmodifiable lifetime healthcare benefits; striking down changes that had saved County $26 million); *Harper Woods Retirees Ass'n* v. *City of Harper Woods*, 879 N.W.2d 897 (Mich. Ct. App. 2015) (reversing summary judgment for City on retiree healthcare vesting claims challenging increase in co-pays, deductibles, and prescription costs).

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Reese III conflicts squarely with this Court's decision in *Tackett* and deepens inter- and intra-circuit splits that encourage forum shopping. It threatens severe adverse consequences for employers and employees alike.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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